

NO. 22671

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT E. McDONOUGH, et al.,

Appellants,

-vs-

SNELLING & SNELLING, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

APPELLANTS' REPLY BRIEF

FILED

AUG 9 1968

WM. B. LUCK CLERK

HENNIGAN, BUTTERWICK,
HANING & DUDA
Attorneys at Law
P. O. Box 1229
Suite 217, Law Bldg.
3972 Main Street
Riverside, California

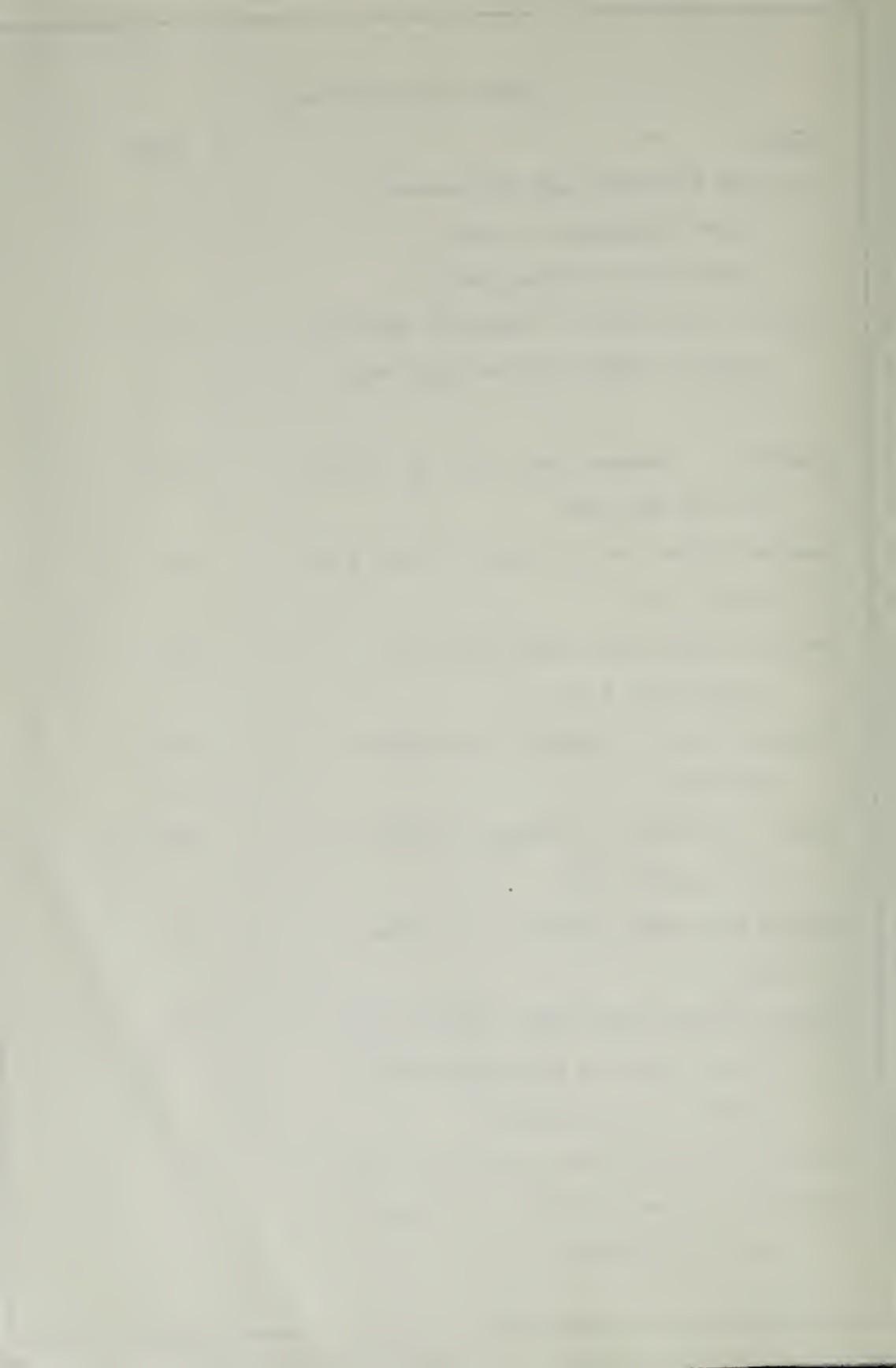
1 INDEX

| | <u>Page</u> |
|--|-------------|
| I. FACTUAL DISTORTIONS IN RESPONDENT'S BRIEF | 1 |
| A. Scope of Hearing and Scope of Appeal | 1 |
| B. Other Factual Misstatements | 6 |
| II. MISCONCEIVED ARGUMENT IN RESPONDENT'S BRIEF | 12 |
| A. Restrictive Covenants, Public Policy and Conflicts | 12 |
| B. Unconscionability of the Contract | 21 |
| C. Trade Secrets | 22 |
| CONCLUSION | 25 |
| ERRATA IN APPELLANTS' OPENING BRIEF (Appendix) | 27 |
| CERTIFICATES OF RULE COMPLIANCE AND OF SERVICE OF BRIEF | 28 |

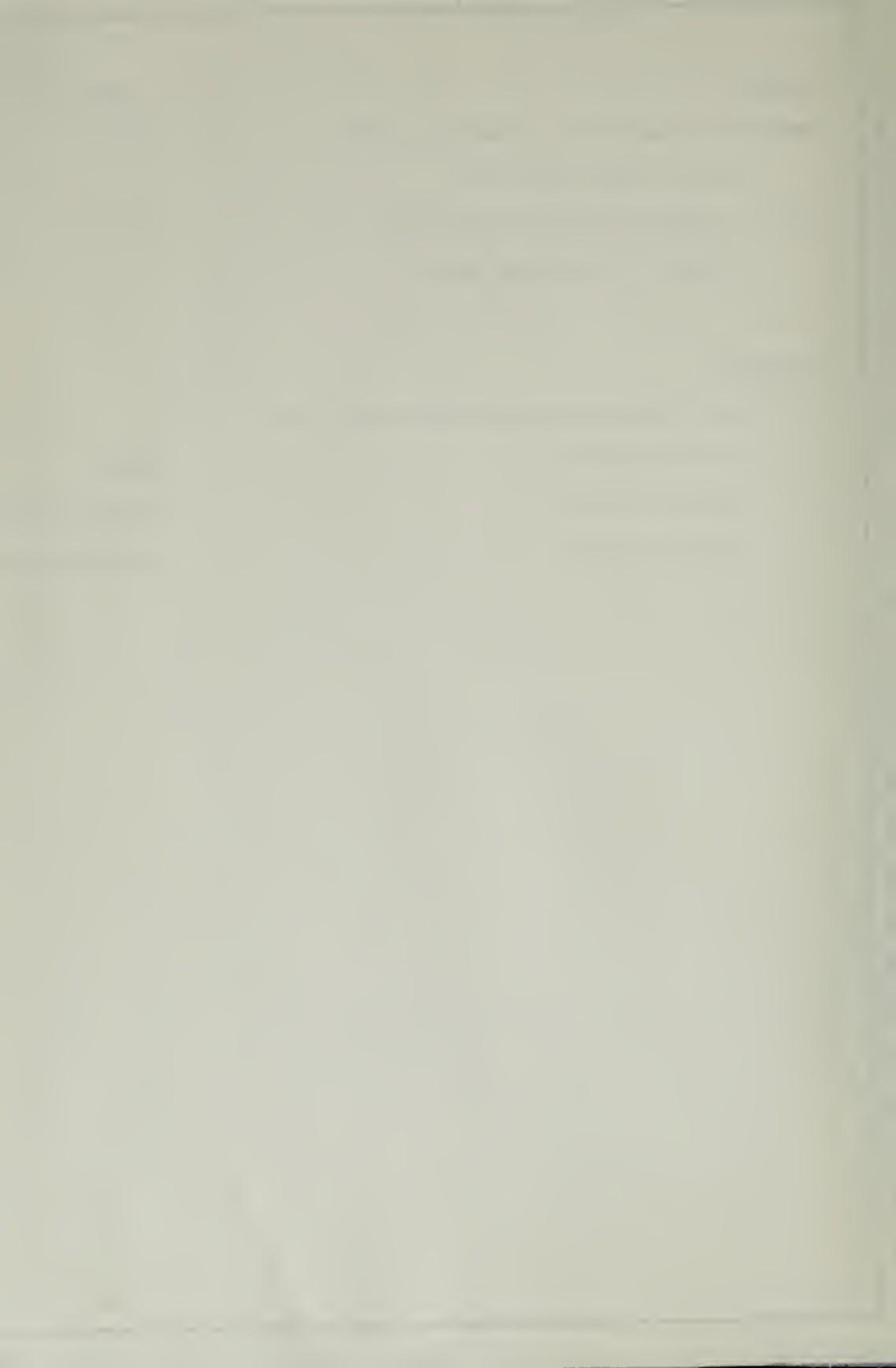


1 TABLE OF CITATIONS
2

| | <u>CASES</u> | <u>PAGE</u> |
|----|--|-------------|
| 3 | Bay Area Painters and Decorators | 18 |
| 4 | Joint Committee v. Orak | |
| 5 | (1951) 102 Cal App 2nd 81 | |
| 6 | Blank v. Palo Alto - Stanford Hospital | 16 |
| 7 | Center (1965) 234 Cal App 2nd | |
| 8 | 377 | |
| 9 | Boughton v. Socony Mobil Oil Co (1965) | 16 |
| .0 | 231 CA 2nd 188 | |
| .1 | Campbell Soup Co. v. Wentz (1948) 172 | 22 |
| .2 | F 2nd .80 | |
| .3 | Davis v. Jointless Fire Brick Co. | 14, 25 |
| .4 | (1924) 300 F. 1 | |
| .5 | Diodes, Inc. v. Franzen (1968) 260 | 23, 24 |
| .6 | ACA 241 | |
| .7 | Ernst and Ernst v. Carlsen (1966) 247 | 24, 25 |
| .8 | Cal App 2nd 125 | |
| .9 | Gordon v. Landau (1958) 47 Cal 2nd | 15 |
| 0 | 690 | |
| 1 | Great Western Distillery Products v. | 15 |
| 2 | John A. Wathen Distillery Co. | |
| 3 | (1938) 10 Cal 2nd 442 | |
| 4 | King v. Gerold (1952) 109 CA 2nd 316 | 17 |
| 5 | Kraemer v. Coward (1934) 2 Cal App | 13 |
| 6 | 2nd 506, 508-511 | |



| <u>CASES</u> | <u>PAGE</u> |
|---|-------------|
| Terry Trading Corp v. Barsky (1930) 210 Cal 428, 433-434 | 13 |
| Ury v. Jewelers Acceptance Corp. (1964) 227 Cal App 2nd 11 | 12, 13 |
| | |
| <u>STATUTES</u> | |
| California Business and Professions Code | |
| Section 16600 | 14-19 |
| Section 16601 | 15,17,18,19 |
| Section 16602 | 15,17,18,20 |



1 UNITED STATES COURT OF APPEALS

2 FOR THE NINTH CIRCUIT

3 NO. 22671

4 ROBERT E. McDONOUGH, et al.,

5 Appellants,

6 - vs -

7 SNELLING & SNELLING, INC.

8 Appellee

9
0 ON APPEAL FROM THE UNITED STATES DISTRICT COURT
1 FOR THE CENTRAL DISTRICT OF CALIFORNIA

2
3 APPELLANTS' REPLY BRIEF

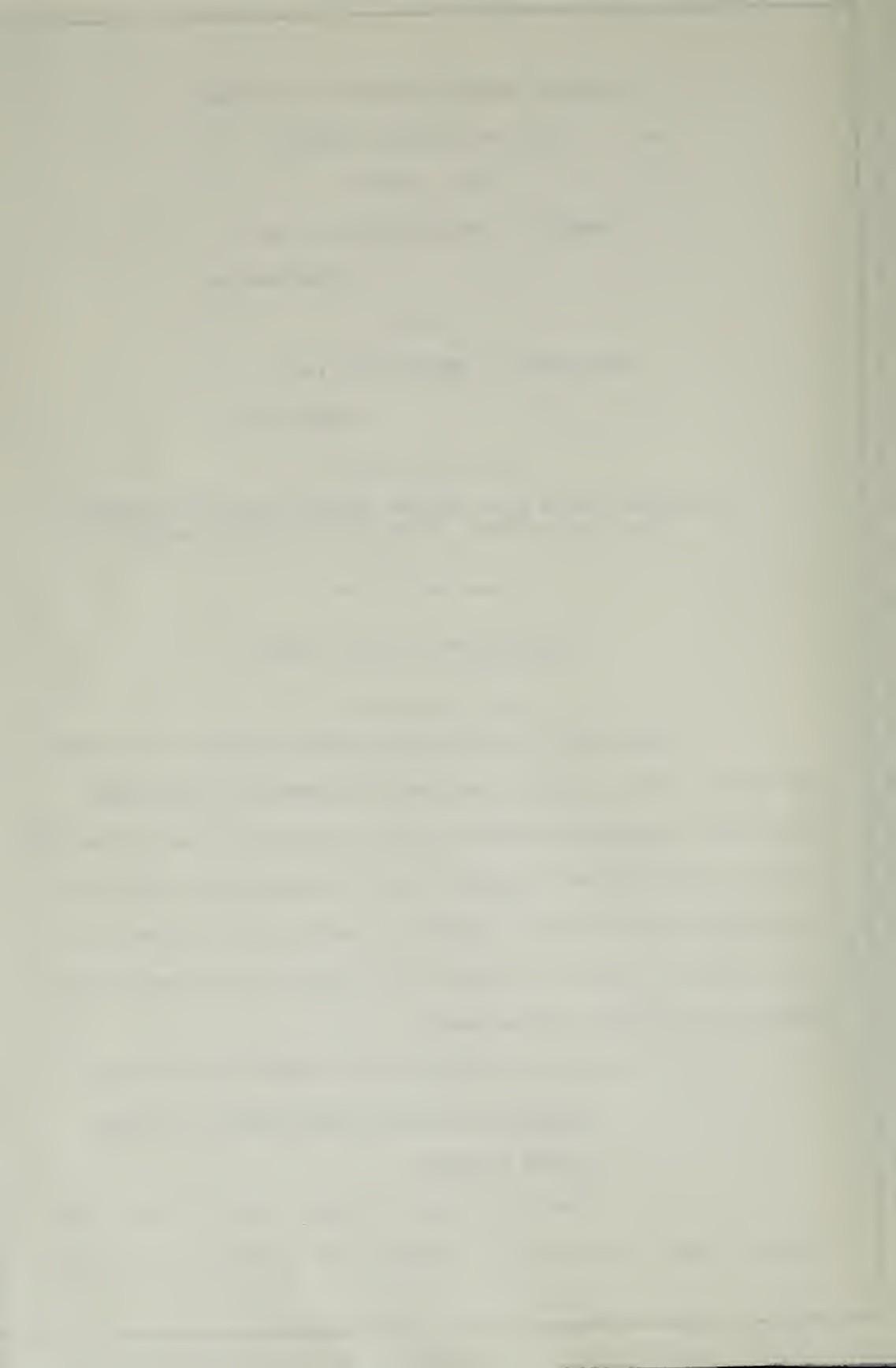
4
5 Respondent's brief has been prepared with zeal
6 and skill. In its application of these two admirable
7 qualities, however, Snelling has frequently sacrificed the
8 factual accuracy and precise legal exposition which are
9 the touchstones of fair appellate advocacy. Appellants
0 will endeavor here to expose and explore representative
1 examples of these sacrifices.

2 I FACTUAL DISTORTIONS IN RESPONDENT'S BRIEF

3 A. Scope of Hearing and Scope of Appeal

4 Trade Secrets

5 Snelling states (Resp. Br. 10) that the
6 hearing "was broadened to include the question of whether



1 Snelling possesses protectable trade secrets when
2 Appellant sought to establish that no such trade secrets
3 exist." A review of the record herein reveals that the
4 McDonoughs (hereinafter referred to in the singular)
5 made at least two forceful attempts to keep the trade
6 secret question out of the hearing (II R. 9:9-11:18;
7 23:7-27:1, with particular emphasis on 26:12-27:1).
8 ¹
9 Snelling produced the manuals in the courtroom and caused
10 them to be received as evidence in the case. In addition,
11 in its Memorandum of Points and Authorities in Support
12 of the Temporary Restraining Order and Order to Show
13 Cause Re Preliminary Injunction, Snelling introduced the
14 "trade secret" issue into the case (I R. 35:17-36:20;
15 38:28-39:12;66:2-67:14). Clearly, from the beginning,
16 Snelling relied on a "trade secret" argument in seeking
17 the preliminary injunction - the issue appears in the
18 first papers it filed.

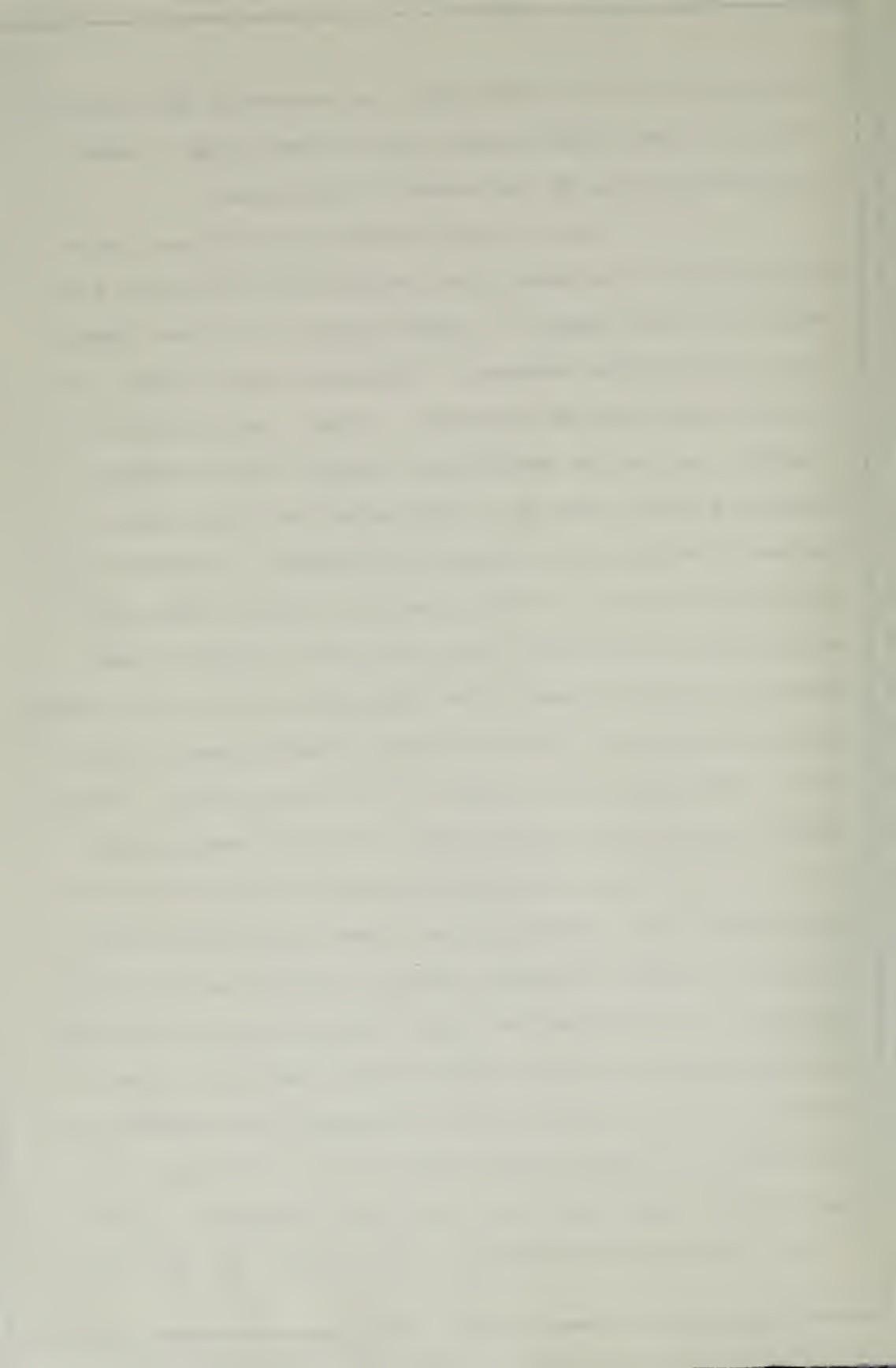
19 In defending against the application
20 for preliminary injunction, when the contention of "trade
21 secrets" had been raised in Snelling's moving papers, /
22 as the source
23 and the training manuals (identified in the moving papers
24 of the "trade secrets") had been received in evidence,
25 McDonough had no choice but to endeavor to rebut this
26 contention in every possible way. But the suggestion by

* 1

Appellants have adopted Respondent's system of
record references to reduce confusion.

Snelling that it was McDonough who broadened the hearing to pick up the trade secret issue, constitutes a gross misrepresentation of the record in this case.

As a further examination of Snelling's moving papers discloses, the preliminary injunction was sought on three bases: 1) trade secrets, 2) trade name, and 3) restrictive covenant. McDonough did not see, at the time the hearing commenced, at any time during the hearing, nor in the proceedings before this Honorable Appellate Court, how the trade secret and trade name issues have had any pertinency whatsoever. Neither the injunction sought nor the injunction granted directed McDonough to discontinue his use of the alleged trade secrets and trade name in San Bernardino County - it simply prevented him from "opening an employment agency office in the City of San Bernardino" (I R 44:2-13; 95). Since McDonough was free, whether the injunction were granted or not, to utilize the alleged trade secrets and utilize the "S & S" name, and use them in San Bernardino County (albeit from his Riverside Office if the injunction were granted) it is impossible to see how the injunction could be predicated upon such foundations. The only relief sought by Snelling was to stop McDonough from opening and operating his office in San Bernardino - the only conceivable legal basis for the court's doing so would be the restrictive covenant in the license and franchise



1 agreement entered into between the parties.

2 Nevertheless, the trial court, in Finding of
3 Fact 14 (I R 126), Finding of Fact 27 (I R 130), Conclusion
4 of Law 3(a) (I R 133-134), set forth its reliance upon
5 the "trade secret" foundation for its order granting the
6 preliminary injunction. Appellant submits this was an
7 irrelevant and immaterial concept, as hereinabove explained,
8 since McDonough remains free today to utilize in San
9 Bernardino any and all of the claimed trade secrets of
0 Snelling, providing only he does it from his Riverside
1 office.

2 . Irreparable Injury

3 Snelling asserts (Resp. Br. 10) that at
4 the last two hearings before the trial court "the parties
5 broadened its scope to include a reexamination of the
6 trade secret question and the propriety of any order
7 enjoining Appellants from operating a personnel agency
8 in San Bernardino." This is certainly not true. Snelling
9 repeatedly and successfully objected to lines of questioning
0 of its witness McBrearty which were being pursued by
1 McDonough (II R. 235:13-236:11; 236:24-237:6; 238:8-19;
2 240:17-241:23; 243:7-17; 249:5-250:12; 278:23-279:7) upon
3 the basis that these hearings involved only the motions
4 for supersedeas and to suspend injunction pending appeal.
5 If, as Snelling suggests, the last two hearings consti-
6 tuted a reexamination of the trade secret and irreparable

1 injury questions, McDonough was severely limited and
2 restricted in his efforts to introduce relevant testimony
3 pertinent to those issues. Additionally, of course, the
4 offered testimony bore on McDonough's Motion for
5 Supersedeas as tending to show that the Riverside franchisee
6 was not the serious threat to Snelling, and that the
7 national franchisor had so many other problems with its
8 franchisees that the damage forecast by McBrearty would
9 have been produced by other causes and that, therefore,
10 the supersedeas should have been granted, permitting
11 McDonough to maintain the San Bernardino office.
12 Additionally, the lines of questioning being pursued by
13 McDonough were relevant and material on his motions to
14 amend and supplement findings of fact and conclusions of
15 law (I R. 104-116) and his motion to suspend injunction
16 pending appeal (I R 102-103), both of which were being
17 heard at the same time (II R 129:4-13; 286:17-24).

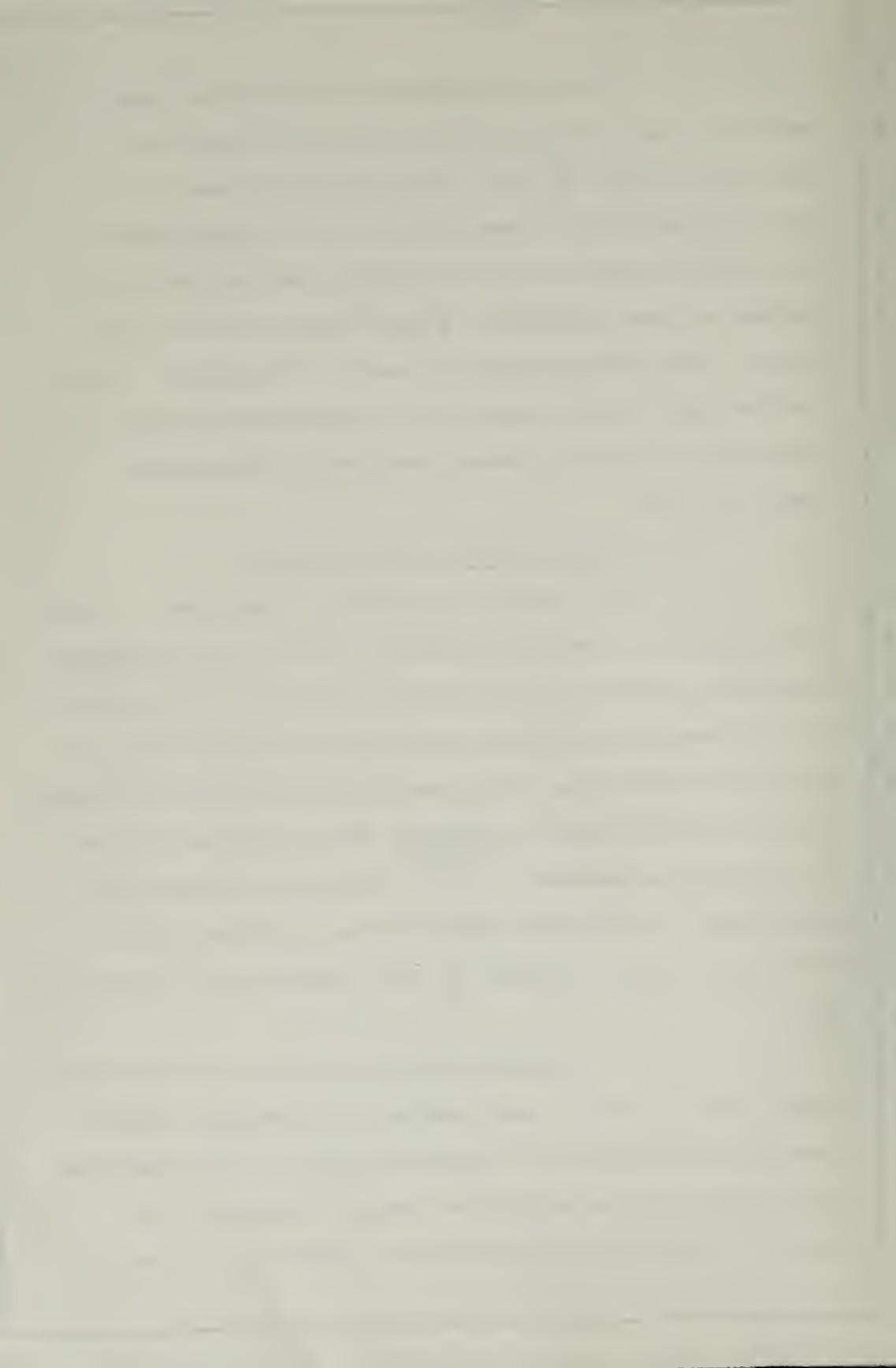
18 No doubt, Snelling would prefer that
19 these hearings of October 31, 1968, and November 17, 1968,
20 be construed by this appellate court as being pertinent
21 to the order granting the preliminary injunction, even
22 though said order was filed October 5, 1967 (I R 95-96),
23 inasmuch as, prior to said hearings, there was absolutely
24 no evidence in the record concerning any prospective
25 injury to its interests, from the opening of the San
26 Bernardino office by McDonough, or otherwise.

1 Surely, considerable effort has been
2 expended in the District Court and in the parties'
3 appellate briefs, on the "trade secrets" question.
4 Appellant maintains, nevertheless, as he maintained in
5 the District Court, that this appeal can and should be
6 decided on the illegality of the restrictive covenant
7 alone. Among other benefits, such a disposition leaves
8 for the trial on the merits the trade secret issue, a
9 development evidently warmly desired by Respondent
10 (Resp. Br. 62).

11 B. Other Factual Misstatements

12 1. Snelling represents (Resp. Br. 2) that
13 its techniques "enable counselors to place all qualified
14 applicants instead of filling only existing 'job orders'".
15 This statement is directly contrary to the testimony of
16 Snelling's number one California franchisee who testified
17 "we work on the basis of whoever comes into our office
18 is placeable somewhere." (II R 96:13-14) and that he
19 recognized that his practices did not conform to the
20 Snelling policy and manual in that regard (II R 121:12-122:
21 11).

22 2. Snelling would have this Court believe
23 (Resp. Br. 3) that it uses the detailed monthly reports
24 from its franchisees to "solve problems in the reporting
25 office and problems which are common throughout the
26 system." Snelling's manual may so state but the record

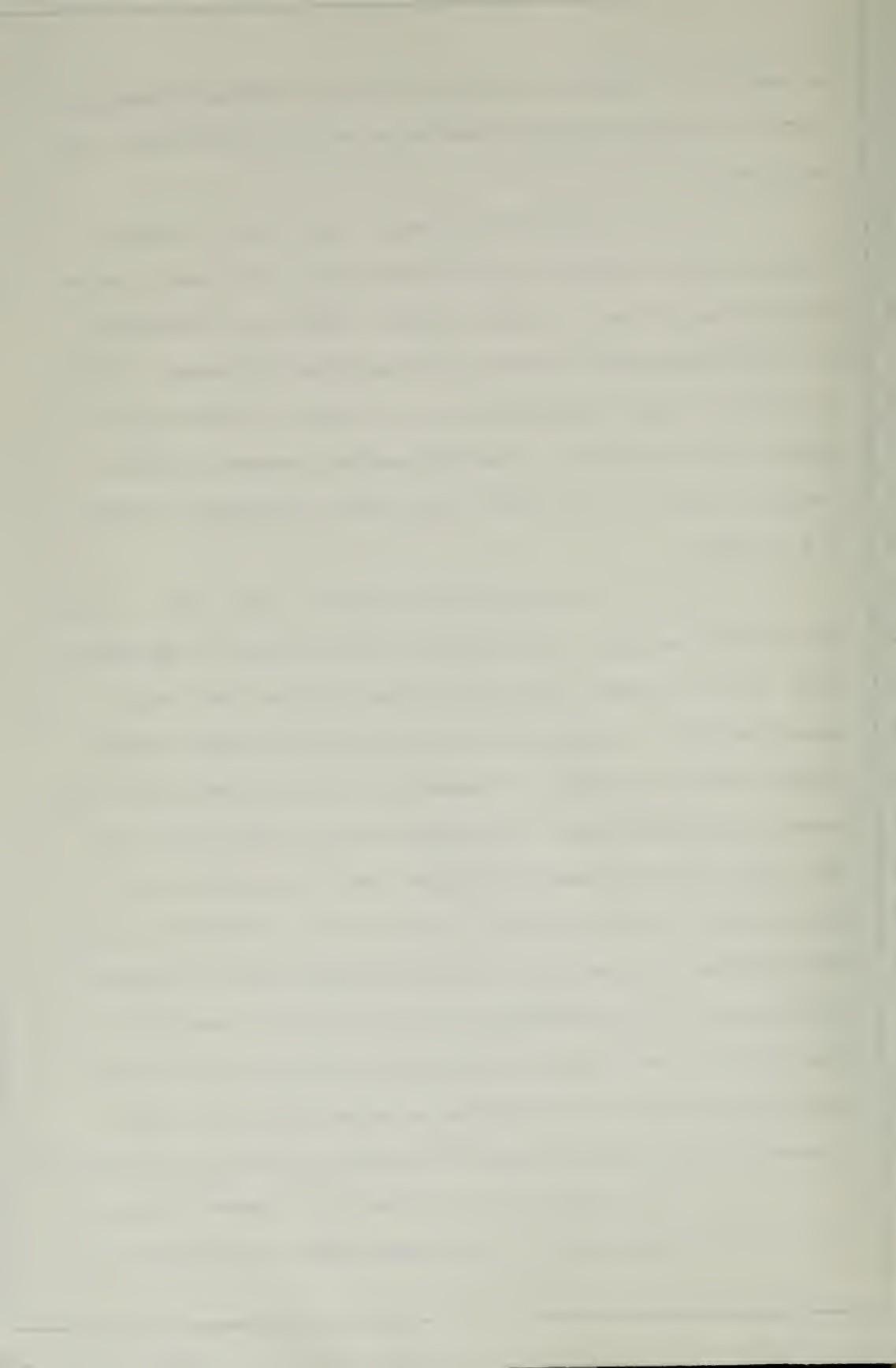


1 is devoid of evidence showing that the detailed monthly
2 reports from the franchisees were actually used for any
3 purpose.

4 3. Snelling states (Resp. Br. 3) that
5 "there is no evidence to indicate that (its name) lacks
6 substantial value" in California. There was positive
7 and uncontradicted direct evidence from McDonough (II R
8 35:2-37:1) that the name was of no use to him when he
9 opened the Riverside - San Bernardino market, that he
10 could not use it, and for that reason promoted his own
11 S & S name.

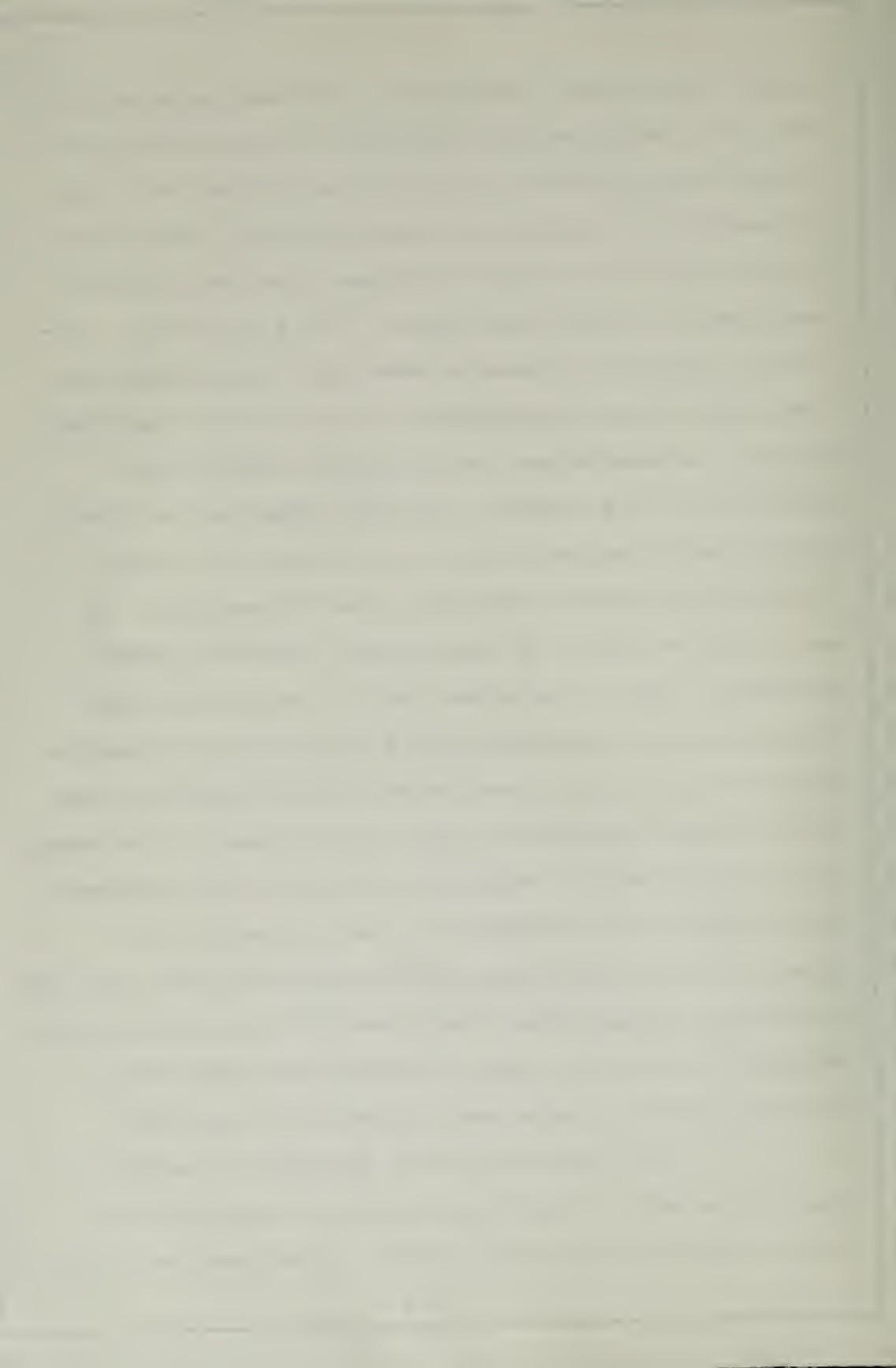
12 4. Snelling has implied (Resp. Br. 3) that
13 out of 500 separate businessmen who have held franchises,
14 only 75 or so have left the system because they were
15 unsuccessful. A more accurate analysis of the record
16 shows that at the time of hearing Snelling had about 275
17 remaining franchisees (II R 255:16-23), about half of
18 the total franchisees who bought into the system had
19 left it (II R 255:24-256:6), about 70 to 75 of the former
20 franchisees had lost all or substantially all of their
21 investment in the franchise (II R 230:1-19), and that
22 the bulk of the sales and transfers of such franchises
23 occurred because the franchisees were unable to make
24 anywhere near the Snelling projected incomes (II R 233:2-21).

25 5. Snelling gratuitously asserts (Resp.
26 Br. 4) that McDonough is "prominent among the rebels"



1 against the national franchisor. No record reference is
2 submitted to support this claim and, in fact, Snelling's
3 officer admitted that he had no reason to believe that
4 McDonough was circulating among any of its franchisees
5 the fact that he is or has withdrawn from the system and
6 rescinded his license agreement. (II R 180:16-21). Ob-
7 viously, whatever prominence McDonough has achieved has
8 come about through his defense of his means of livelihood
9 against the demands and the litigation commenced by
10 Snelling, and his refusal to knuckle under to the fraud,
11 deceit, and misrepresentation, the unfair and illegal
12 contracts and demands emanating from Philadelphia. He
13 was a passive member of the national franchise system,
14 delinquent only in the payment of his contractual over-
15 rides because of numerous prior breaches of the franchise
16 agreement by Snelling, when he was thrust upon the stage
17 of the federal courtroom at Snelling's behest. Prominence,
18 like beauty, probably exists in the eye of the beholder -
19 but to justify the assertion of its existence in an
20 appellate brief some substance should support the statement.
21 It appears, rather, that this is one of the many unfounded
22 efforts of Snelling to cast an unfavorable aura about
23 McDonough which his acts and conduct do not warrant.

24 6. Snelling accuses McDonough of seeking to
25 reap the benefit of the Snelling association even while
26 he was refusing to pay his 7 percent overrides (Resp. Br. 5)



1 Nothing, according to the record, could be farther from
2 the truth. McDonough's straightforward and uncontradicted
3 testimony was that he attempted to promote the use of and
4 capitalize upon the Snelling name until January of 1966
5 (the first month in which he discontinued paying over-
6 rides) and then ceased the practice because of his inability
7 to advertise in the Snelling name, the inability of his
8 employer contacts to find his office through the medium
9 of the telephone listings, and the resulting confusion
10 and loss of business which ensued (II R 35:7-37:1)

11 7. Again (Resp. Br. 9 and 10) Snelling
12 charges McDonough with attempting to negotiate a modified
13 contract or other settlement of the dispute with Snelling,
14 without mentioning his San Bernardino plans. While the
15 bare fact is admittedly true, the opprobrium Snelling
16 seeks to attach to it is undeserved. In the first place,
17 there is no evidence whatever that McDonough had any
18 plans regarding San Bernardino until after his receipt of
19 Snelling's notice of intention to terminate of May 10,
20 1967 (I R 26). This letter informed McDonough that he
21 would be subjected to all of the default provisions of
22 the license and franchise agreement, which included
23 requirements that he turn over all of his business
24 records and books of account, his telephone number and
25 his office space. Clearly, the receipt of this notice
26 necessitated some soul searching on McDonough's part.

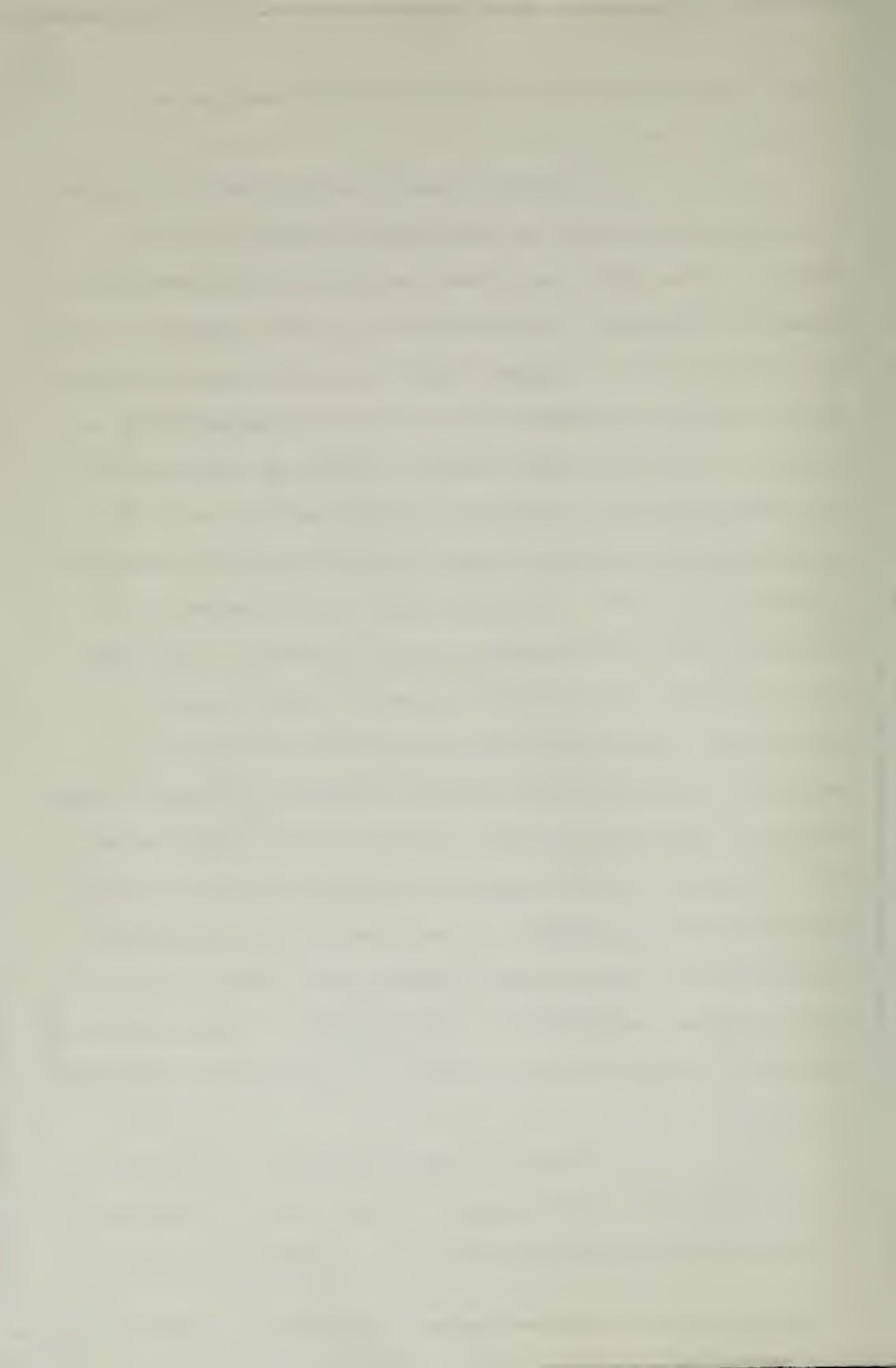
1 His response, the notice of rescission (I R 56-58) if
2 justified and effective, would have severed all future
3 obligations between them. Thus, at this point, there
4 would be no point in McDonough's stating anything of his
5 future plans to Snelling, relative to San Bernardino or
6 anywhere else.

7 On page two of Snelling's termination
8 letter of July 21, 1967 (I R 28) Snelling reiterated its
9 demands that the default provisions of the license agree-
10 ment be complied with. If done, this would have effectively
11 removed McDonough from the employment agency business in
12 Riverside. His response did nothing to deceive or mislead
13 Snelling in any way. The first proviso of his settlement
14 offer (I R 61) was that "the license agreement be
15 considered terminated or rescinded and each party will
16 release the other from any and all claims arising there-
17 from." Even if McDonough planned to open a new personnel
18 agency franchising business in Radnor, Pennsylvania, such
19 intention would hardly be germane to the settlement offer
20 if that initial proviso had been agreed upon. Further,
21 as the sixth condition of the proposed settlement (I R 62),
22 McDonough disclaimed any intention of reserving Riverside
23 as his sole domain under the Snelling system, and pro-
24 posed that Snelling would be free to sell its franchise
25 to any new purchaser whatever. Under these circumstances,
26 there was no conceivable duty on McDonough's part to

1 bring his San Bernardino plans to the attention of
2 Snelling.

3 8. Snelling seeks support for its claims
4 of irreparable injury by the court's taking judicial
5 notice of the fact that other Snelling franchisees were
6 present throughout the protracted hearings (Resp. Br. 15).
7 Appellants have no quarrel with the court taking judicial
8 notice of those matters which it has the capacity to so
9 notice. The transcript reference given by Snelling for
10 the above statement, however, refers only to certain
11 unidentified persons who appeared at the first hearing on
12 September 27, 1967. How the court could divine the
13 identity of the spectators in the courtroom, let alone
14 take judicial notice that they were other Snelling
15 franchisees (with the exception of Mr. La Perch who
16 testified and identified himself as such) is beyond under-
17 standing. The fact is that except for the VanTilbergs
18 (the Snelling San Bernardino franchisee) there was no
19 other franchisee present in the courtroom at any time,
20 or representatives of such franchisees, except those who
21 were named as defendants in the law suit. That portion of
22 Finding of Fact 28 (I R 131:5-10) is without evidentiary
23 support.

24 9. Again, on the threat of irreparable
25 injury, Snelling seeks support in McDonough's discussion
26 of the San Bernardino situation with other Snelling



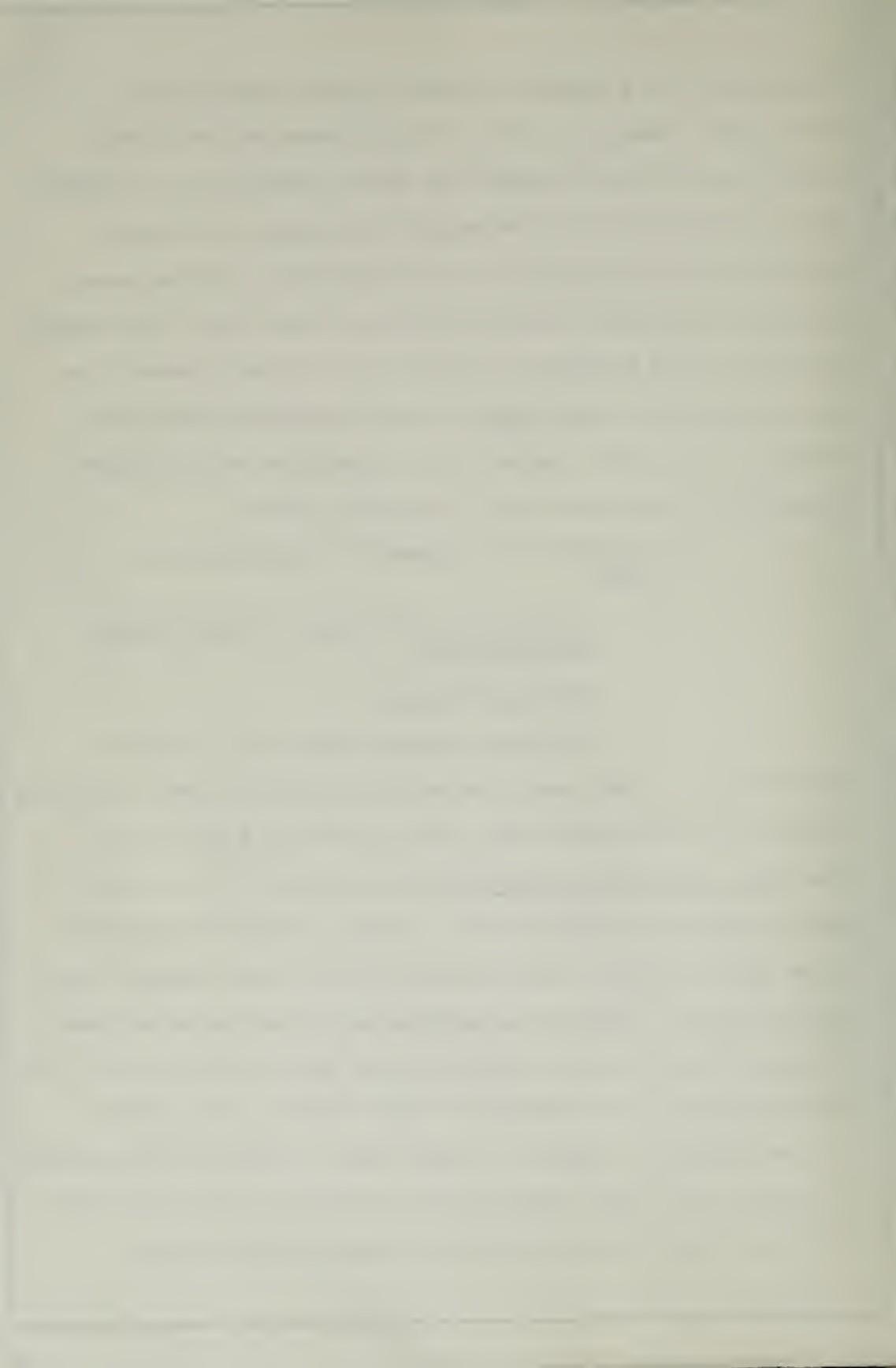
1 franchisees at a meeting of the National Employment
2 Association (Resp. Br. 16). This discussion occurred
3 after the court had issued its order granting the prelimi-
4 nary injunction and could hardly have been considered
5 by the court in arriving at that decision. Furthermore,
6 the San Bernardino situation had not been "well advertised
7 throughout the system" as stated by Snelling inasmuch as
8 the evidence was that none of the franchisees McDonough
9 talked to were even aware of an injunction being sought
10 against his franchise (II R 271:2-4; 11-14).

11 II MISCONCEIVED ARGUMENT IN RESPONDENT'S
12 BRIEF

13 A. Restrictive Covenants, Public Policy
and Conflicts

14 The Ury Decision

15 Snelling argues (Resp. Br. 35) that
16 "few bodies of law have changed more rapidly than 'conflicts'
17 during the years since 1924" and asserts a belief that
18 the Ury v. Jewelers Acceptance Corp. (1964) 227 Cal App
19 2nd 11, decision exemplifies a change in the "conflicts"
20 rules pertaining to contractual choice of law versus forum
21 public policy. Sneling demonstrates a slavish attachment
22 to Ury (I R 69, 71-74, 135-136, Resp Br. 20, 22, 26-30, 35)
23 which permits it to overlook completely the true thrust
24 of the decision. Ury is a usury case. Conflicts questions
25 in usury cases were traditionally decided on the classical
26 factor of place of contracting, place of performance

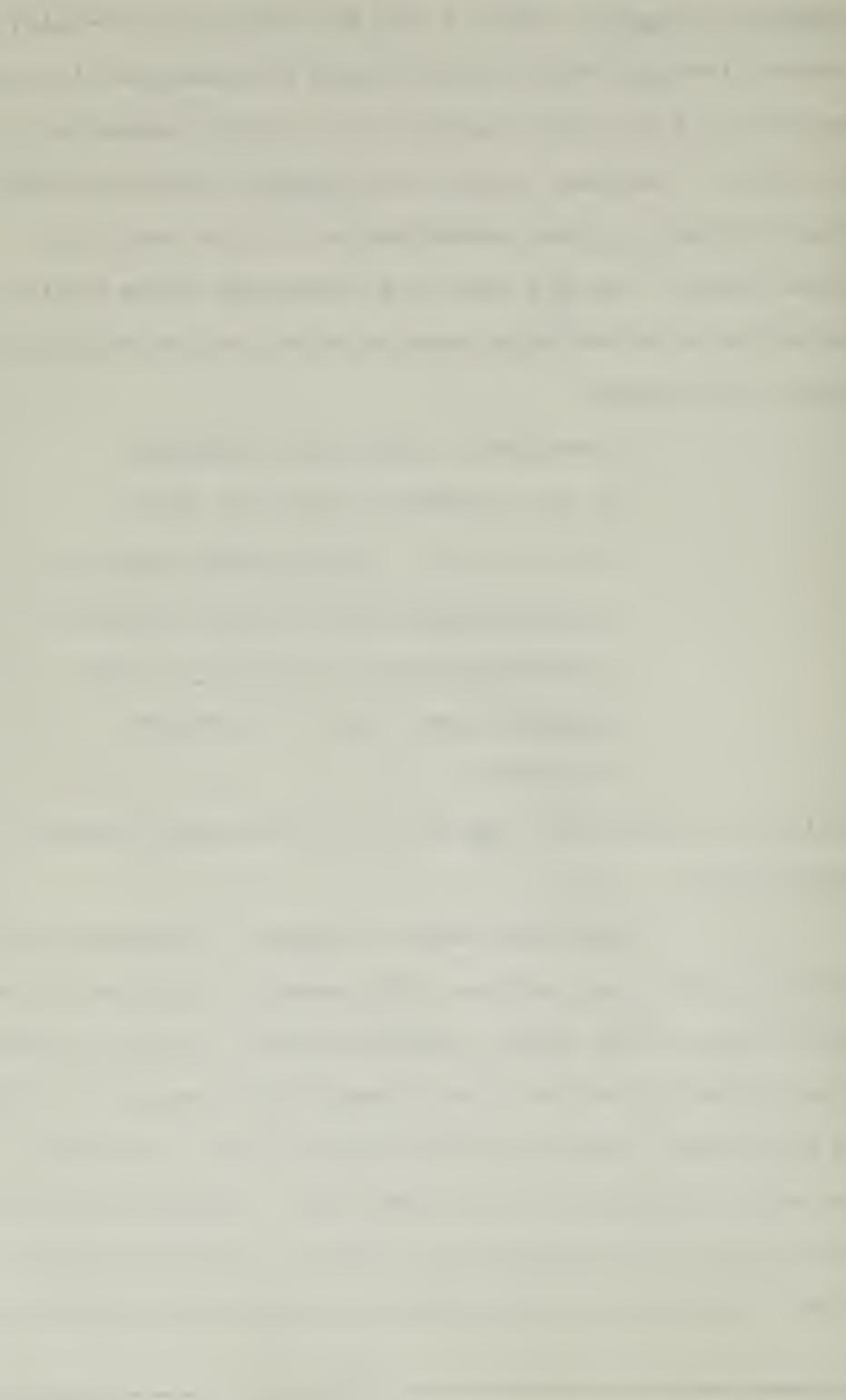


1 (Terry Trading Corp v. Barsky (1930) 210 Cal 428, 433-434;
2 Kraemer v. Coward (1934) 2 Cal App 2nd 506, 508-511;).
3 Indeed, the Ury court itself based its decision in large
4 measure on these same factors (pp. 16-18, Headnotes 1, 2,
5 3, and 6). Neither Terry nor Kraemer even mentioned
6 public policy in the determination of the conflicts
7 issue there. And Ury does not downgrade forum public
8 policy as a determining consideration in the conflicts
9 cases. Ury says:

10 "The law of conflicts, however,
11 is in a condition that is by no
12 means static. Strong public policy
13 of the forum, which always has been
14 a consideration, is surely no less
15 regarded now." (p. 20 - emphasis
16 supplied)

17 Snelling's claims for Ury will not withstand critical
18 examination.

19 There has been no change in the concept
20 that the forum can and must disregard the choice of law
21 of the parties in those instances where the law so chosen
22 flies directly in the face of settled forum public policy.
23 In Appellants' Opening Brief (pages 17-27) a host of
24 judicial decisions in California and elsewhere are discussed
25 which propound the points (1) that in California as in
26 other jurisdictions, the public policy against restrictive

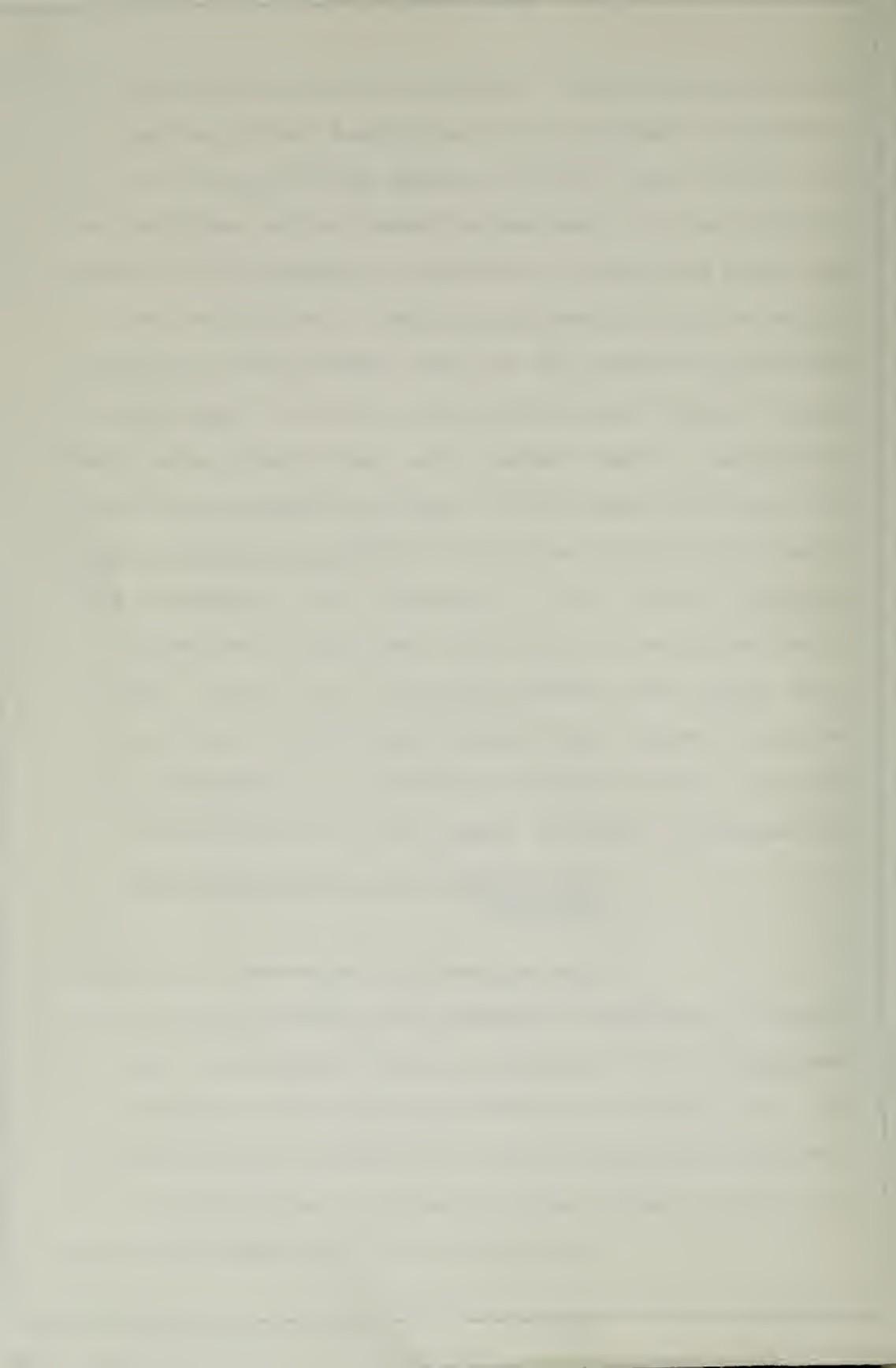


covenants is settled; (2) that in such jurisdictions, contracts in violation of the settled public policy are invalid; and (3) that settled public policy in a jurisdiction is a dominating factor in the conflicts of law field sufficient to warrant a disregard of the choice of law of the contracting parties. Snelling has been unwilling or unable, or at least disinclined, to devote even a single line in its brief, to rebut, disparage or distinguish, in any fashion, the rules these cases stand for, with the exception of the dust-catching appellation given this court's decisions in Davis v. Jointless Fire Brick Co. (1924) 300 F. 1 Resp Br. 35). McDonough has cited decisions in 1948, 1954, and two in 1965 which cited Davis with approval (App. Op. Br. 24-25). This certainly should have vacuumed up a bit of the four decades of dust Snelling observed in its inspection of the decision. Snelling looks, but it will not see.

The Business and Professions Code Sections

Instead, Snelling represents that Section 16600 of California's Business and Professions Code "is honeycombed with judicially created exceptions" (Resp. Br. 31). While \$1,500,000.00 per year in overrides is a strong motivation to keep a franchise system intact, it will not justify such a sweeping generalization.

It is first noted that the legislature



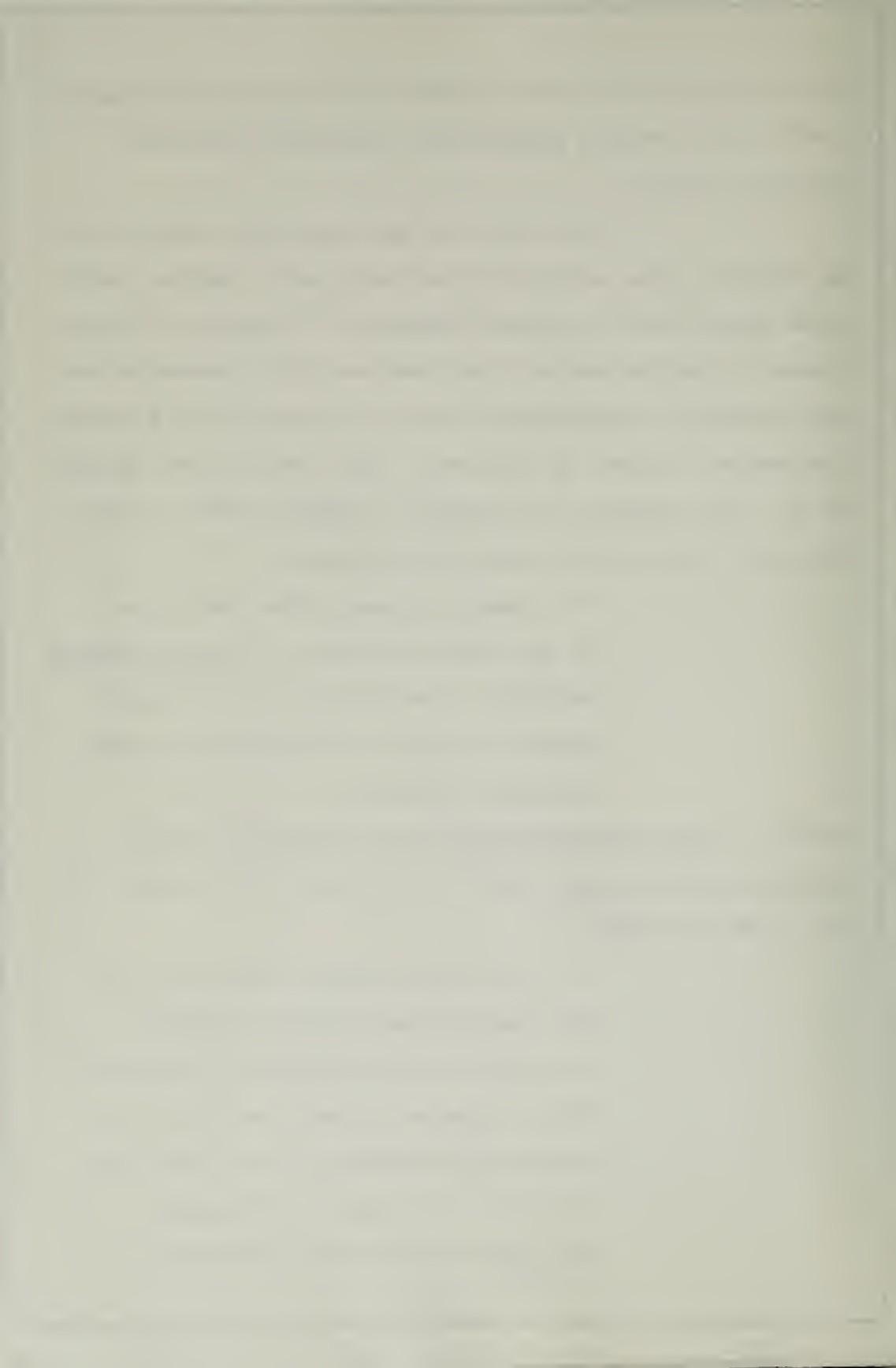
1 itself provided the only exceptions (Sections 16601 and
2 16602) to the basic prohibitory statutory provision
3 (Section 16600).

4 Secondly, in the decisions referred to
5 by Snelling, the courts did not honeycomb Section 16600
6 with exceptions but merely declared, in answer to conten-
7 tions of parties before them that certain agreements had
8 the effect of restraining them from "engaging in a lawful
9 profession, trade, or business" that they did not really
10 do so. For example, in Gordon v. Landau (1958) 47 Cal
11 2nd, 690, at page 694, the Court states:

12 "It clearly appears from the terms
13 of the contract that it did not prevent
14 defendant from carrying on a weekly
15 credit business or any other business."
16 (Emphasis supplied)

17 Again, in Great Western Distillery Products v. John A.
18 Wathen Distillery Co. (1938) 10 Cal 2nd 442, at page 446
19 the Court explains:

20 "... Both the purpose and effect of
21 the contract are not to restrict
22 the sale of the defendant's receipts,
23 but to create an instrumentality by
24 which the receipts will be exploited
25 and sold. The contract does not
26 restrain anyone from exercising a



1 trade or business of any kind
2 within the purview of Section 1673
3 of the Civil Code." (Emphasis
4 Supplied)

5 Blank v. Palo Alto - Stanford Hospital Center (1965) 234
6 Cal App 2nd 377, involved a question of whether a hospital
7 could properly enter into an exclusive contract for the
8 operation of its x-ray diagnostic facility, the provision
9 for which was required by the California Administrative
10 Code. The opinion deals not with Sections 16600 et seq.
11 At pages 388-389 of the opinion, the court explained
12 in substantial detail why the method selected was a
13 proper exercise of discretion. Appellant there was not a
14 party to the contract in question and could freely practice
15 his profession, in all its aspects, at any place other
16 than the defendant hospital. As stated, the basis for
17 the decision was far removed from any consideration of
18 the statutory language of the provisions of the Business
19 and Professions Code involved in this case.

20 Boughton v. Socony Mobil Oil Co. (1965)
21 231 CA 2nd 188 involved the construction of a condition
22 subsequent in a deed of real property:

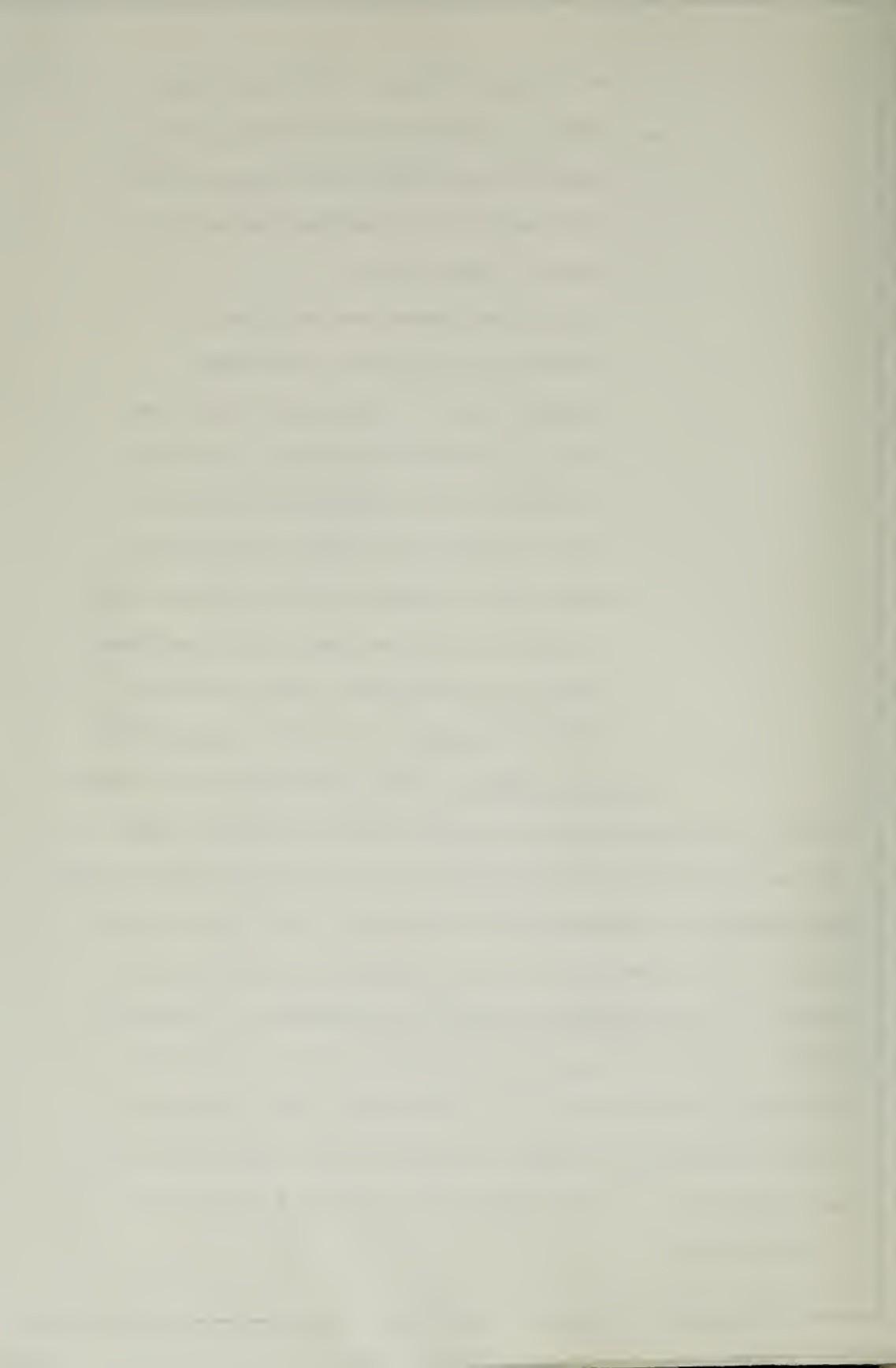
23 "The single restriction is imposed,
24 not personally on plaintiffs restraining
25 them from engaging or carrying on
26 any profession, trade or business but,



1 on the use of the land upon which
2 they as grantees are barred merely
3 from selling petroleum products and
4 then only for a limited period of
5 time." (Page 190)

6 " While the cases are uniform in
7 refusing to enforce a contract
8 wherein one is restrained from pur-
9 suing an entire business, trade or
10 profession, as falling within the
11 ambit of Section 16600 (citations),
12 where one is barred from pursuing only
13 a small or limited part of a business,
14 trade, or profession, the contract
15 has been upheld as valid." (Page 192)

16 King v. Gerold (1952) 109 CA 2nd 316 dealt
17 with an agreement which Snelling characterizes (Resp. Br.
18 34) as one which restrained trade and did not come within
19 the exceptions enumerated in Sections 16601 and Section
20 16602. Of course, not every contract which restrains
21 trade in the slightest degree is prohibited by Section
22 16600. As the statute makes plain, it is only those
23 contracts by which one is "restrained from engaging in a
24 lawful profession, trade or business of any kind" which
25 are unlawful. In the King case the court notes this
26 distinction:



1 "Appellant is not (by the agree-
2 ment) prohibited from carrying on
3 his lawful business of manufacturing
4 trailers but is barred merely from
5 manufacturing and selling trailers
6 of the particular design and style
7 invented by respondent" (Emphasis
8 Supplied)

9 The final judicial honeycomb found by
10 Snelling is Bay Area Painters and Decorators Joint
11 Committee v. Orak (1951) 102 Cal App 2nd 81. Sections
12 16600-16602 do not appear in the opinion. Appellants
13 submit that none of these cases constitute a "judicially
14 created exception" to Section 16600 of the Business and
15 Professions Code. Two of the decisions do not discuss
16 the statutory provision at all. The other four simply
17 find that four contracts that impose an extremely slight
18 restraint upon the complaining party did not prevent
19 him from engaging in whatever business, trade or profession
20 he chose. Contrast such provisions with the restraints
21 in the Snelling franchise:

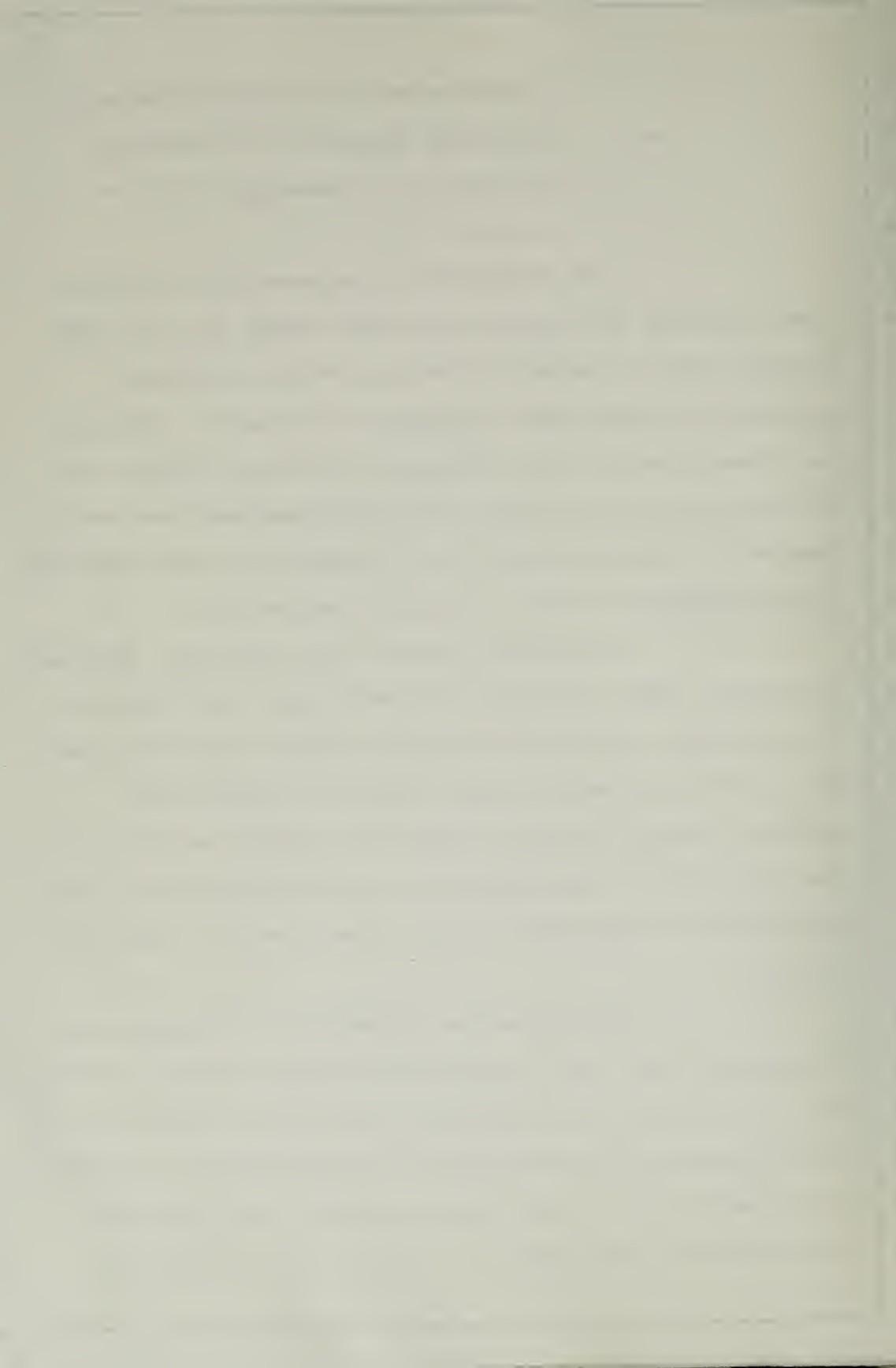
22 "Licensee shall not thereafter engage
23 ... in a similar business to that
24 licensed and established hereunder
25 ..." (Paragraph 8(b) - I R 22)

1 "Licensee may be enjoined from any
2 continued operation of Licensee's
3 business ..." (Paragraph 11(g) -
4 I R 21)

5 Two additional incomprehensible proposi-
6 tions advanced by Snelling are those (Resp. Br. 36) sug-
7 gesting that the default provision of the franchise
8 agreement contemplates a transfer of goodwill bringing
9 the covenant within the exception of Section 16601, and
10 its conclusion that "here, the entire business has been
11 created by the franchisor and is operated by the franchisee
12 in partnership with the national organization".

13 The thought behind the exceptions afforded
14 by Section 16601 is rather obviously that one should not
15 be allowed to sell for a valuable consideration the good-
16 will of his business (whether through a sale of the
17 business itself, a sale of corporate shares, or sale by
18 the corporation) and then act in direct derogation of the
19 sale made and continue to utilize the goodwill asset for
20 himself.

21 To equate the circumstances contemplated
22 by Section 16601 with the imperious demand of the franchisor
23 here is an impressive deductive feat but one devoid of the
24 usual reasoning process that goes with deduction. Section
25 16601 deals with one who sells goodwill. The proposed
26 acquisition of the goodwill of appellants' business by

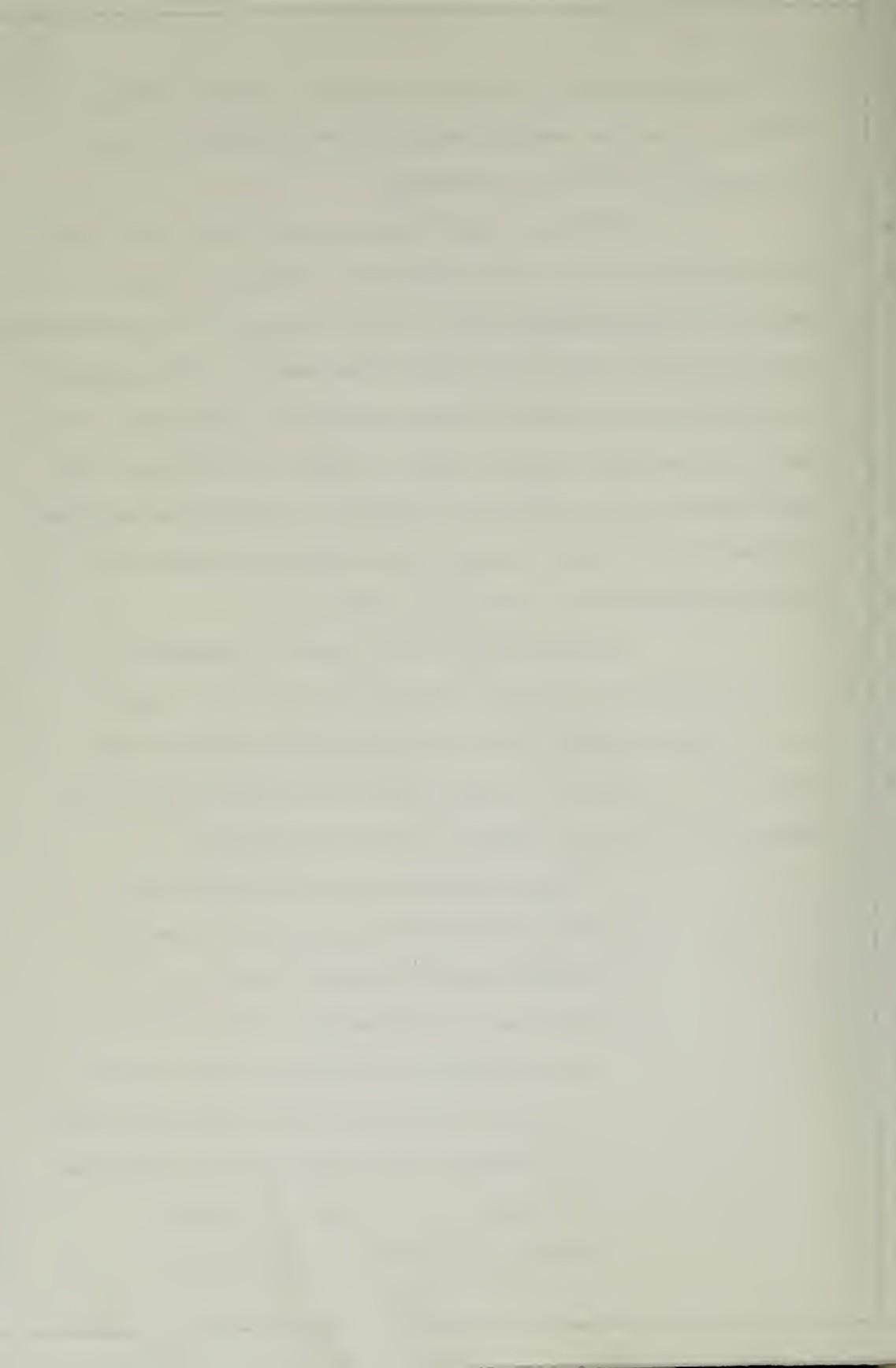


1 the default process is as far removed from any normal
2 concept of a free bargain and sale of goodwill as any
3 transaction that can be imagined.

4 Similarly, for Snelling to claim that the
5 entire business has been created by and that it has
6 operated in partnership with its franchisee is to disregard
7 whose business assets are under discussion. The goodwill
8 of the Riverside franchise was created by McDonough. The
9 Snelling name was nothing when he came to Riverside and
10 every asset of the franchise office in Riverside has been
11 produced by the time, energy and capital of Robert E.
12 and Elsa McDonough, and their employees.

13 Paragraph 9 of the license agreement
14 (I R 21) promptly derails Snelling's inference that it
15 was in a partnership with its franchisee which, being
16 dissolved the default brings the transaction within the
17 exception of Section 16602. It states in part:

18 "Snelling shall not be liable for
19 any such expenses, taxes, levies or
20 disbursements otherwise paid or
21 incurred in connection with the
22 establishment and maintenance of the
23 aforesaid business, and licensee agrees
24 to indemnify and hold Snelling harmless
25 from any and all claims, suits,
26 demands or other causes of action,



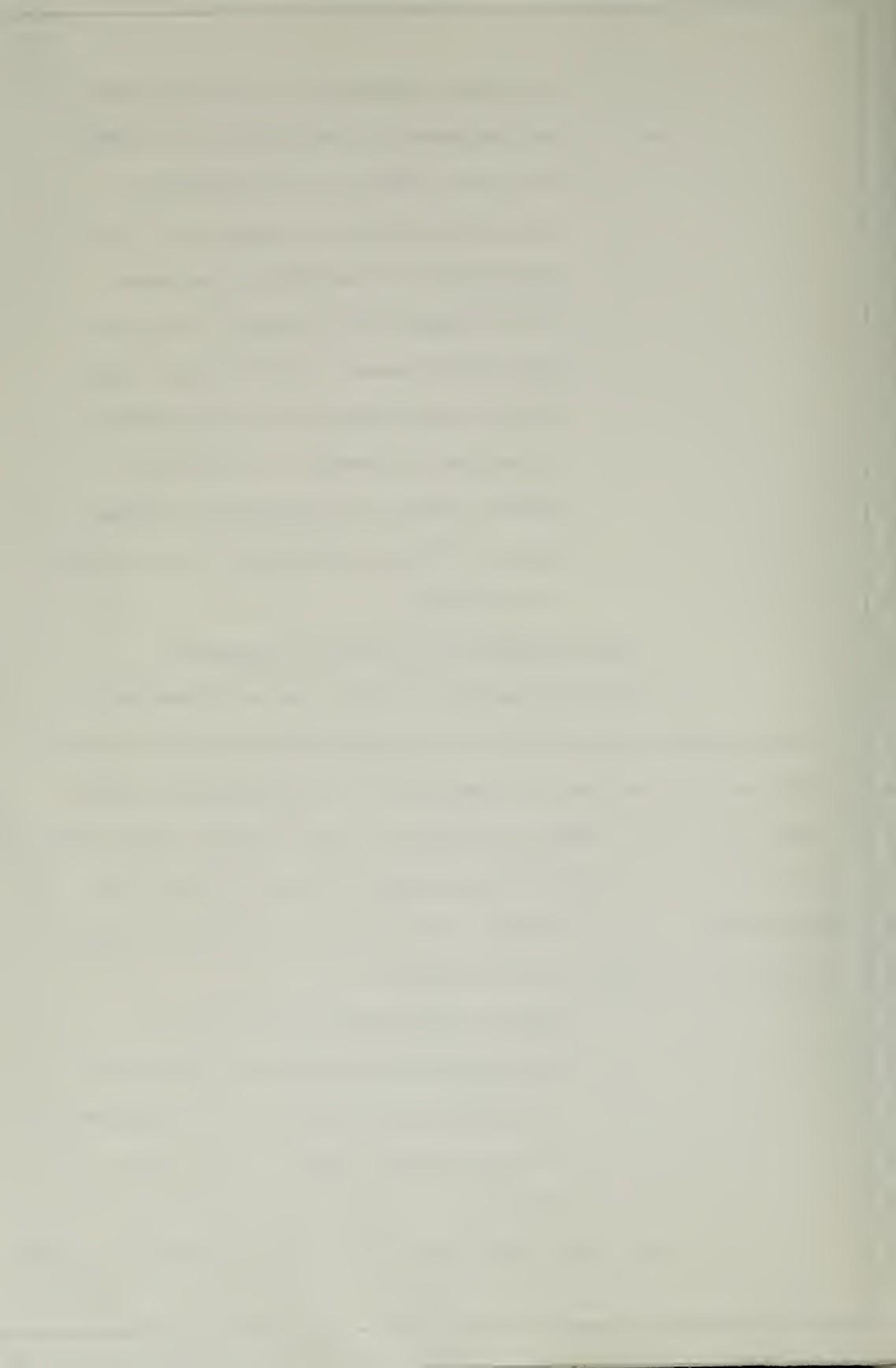
including reasonable attorneys fees and expenses in defending the same, which may arise or be asserted against Snelling by reason of the operation of licensee's business or by reason of licensees' use of Snelling's name. In granting this license Snelling does not authorize or empower licensee ... to hold himself out as a general or special agent, officer, director, or partner of Snelling."

B. Unconscionability of the Contract

Snelling seeks to avoid the evaluation of the unconscionable nature of its contract by stating that the question was never presented to the District Court (Resp. Br. 58). While not dwelt on at length, Appellants' points and authorities in support of their Motion for Supersedeas and to Suspend the Injunction Pending Appeal contained the point of law that:

"Equity does not enforce unconscionable bargains and specific and injunctive relief will be denied on that ground alone." (I R 100: 29-31)

The very same decision of the Court of Appeals



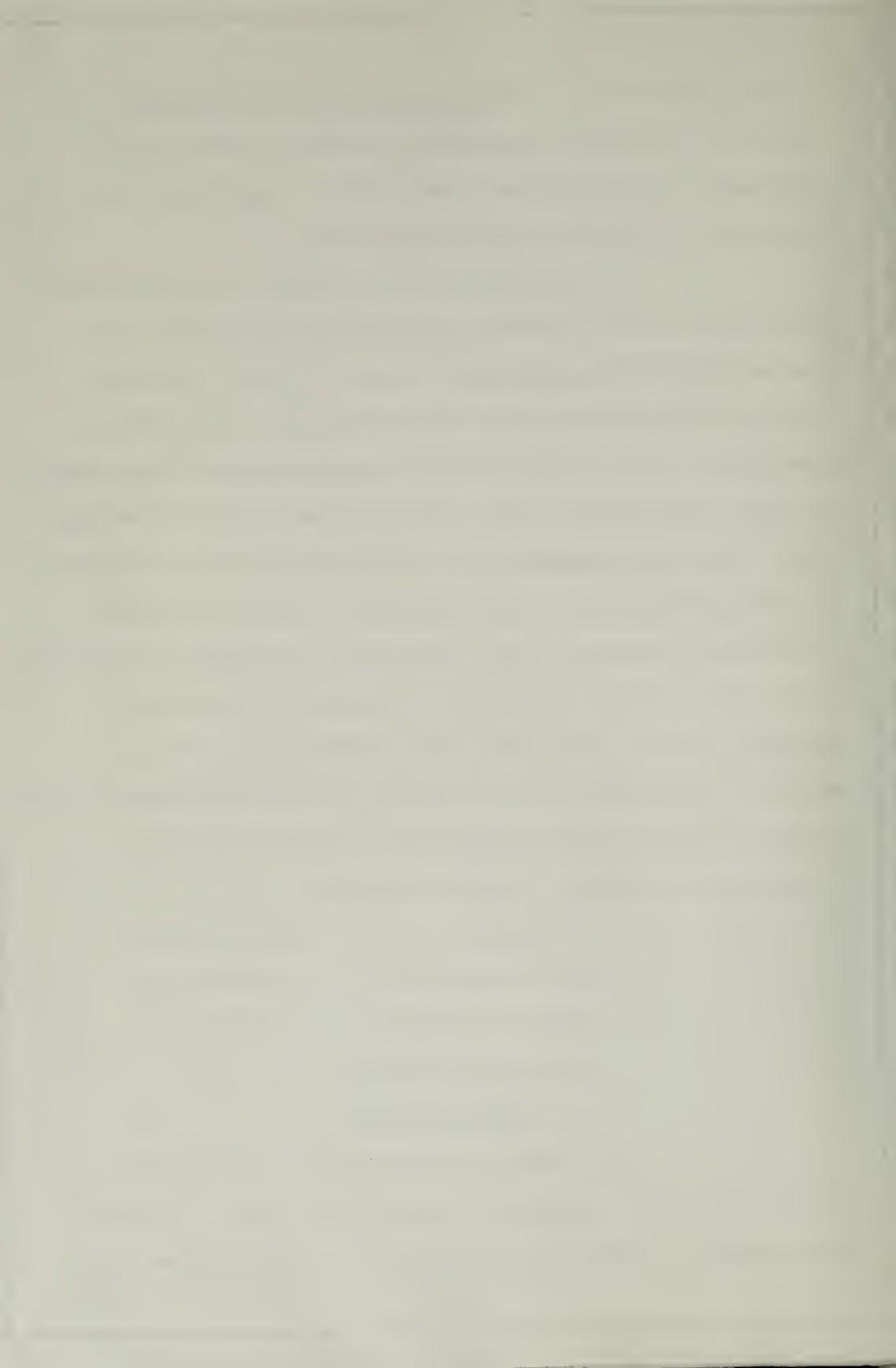
1 for the Third Circuit of Campbell Soup Co. v. Wentz
2 (1948) 172 F 2nd 80, discussed at pages 52 and 58 of
3 Appellants' Opening Brief, was cited as authority for
4 that point of law in the District Court.

5 In its effort to ameliorate the burdensome
6 provisions of its license and franchise agreement as
7 discussed by McDonough (App. Op. Br. 53-58), Snelling
8 relies on suggestions that the criticized contractual
9 provisions have not in fact been troublesome to appellants
10 or other franchisees, that Snelling has not exercised its
11 right under the agreement in some particulars, and that
12 in the performance of the contracts, strict adherence
13 to the provisions has not always been required by Snelling
14 (Resp. Br. 58-60). This begs the question posed by
15 Campbell supra, where the court withheld the aid of
16 equity on the basis of the content of the agreement itself,
17 without regard to the performances under it by the
18 contracting parties, in this language:

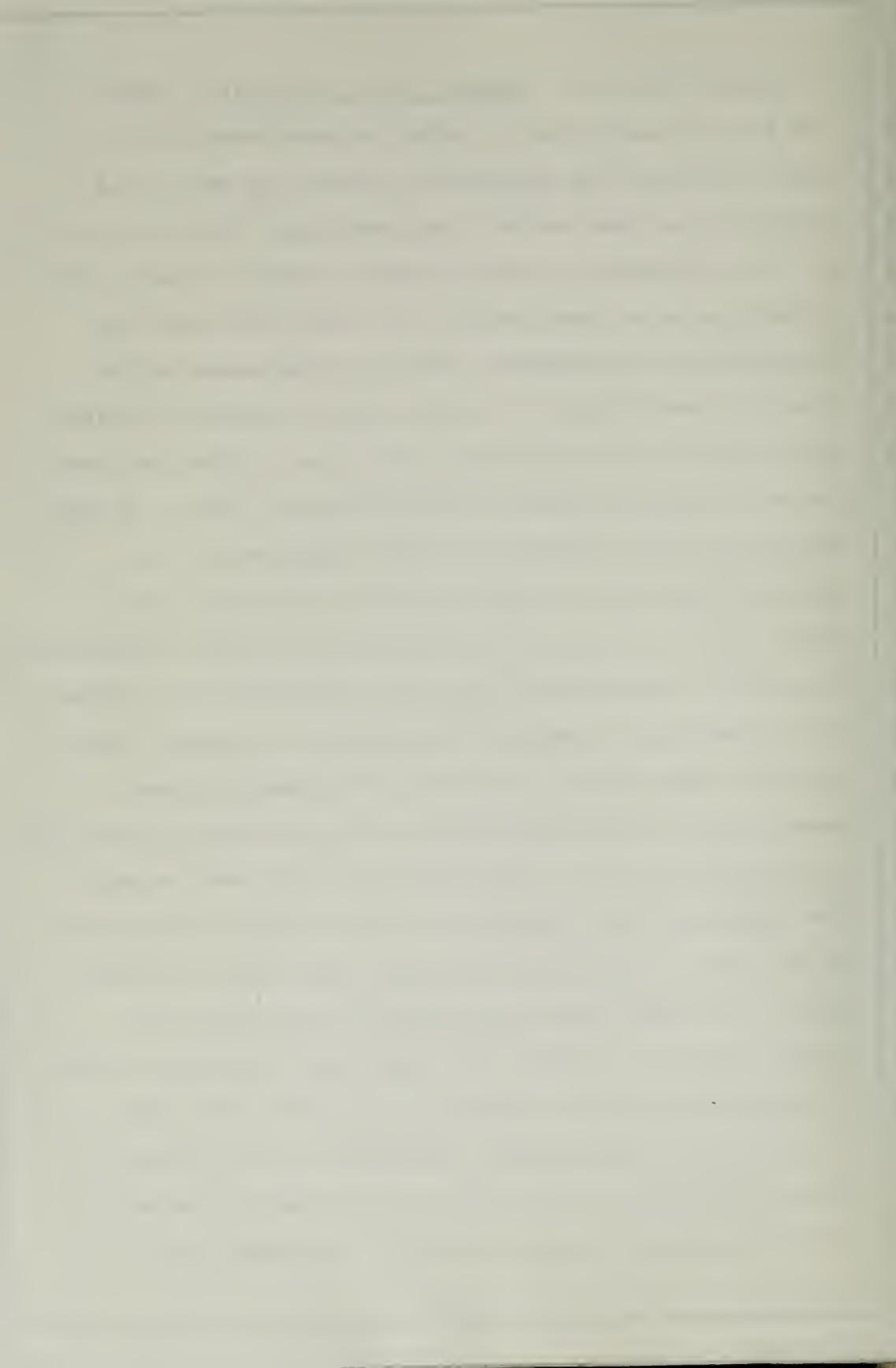
19 "We think it is too hard a bargain
20 and too one-sided an agreement to
21 entitle plaintiff to relief in a
22 court of conscience."

23 C. Trade Secrets

24 In a recent pleading case, testing the
25 sufficiency of a complaint against a demurrer, Justice
26 Hufstedler, of California's District Court of Appeal for



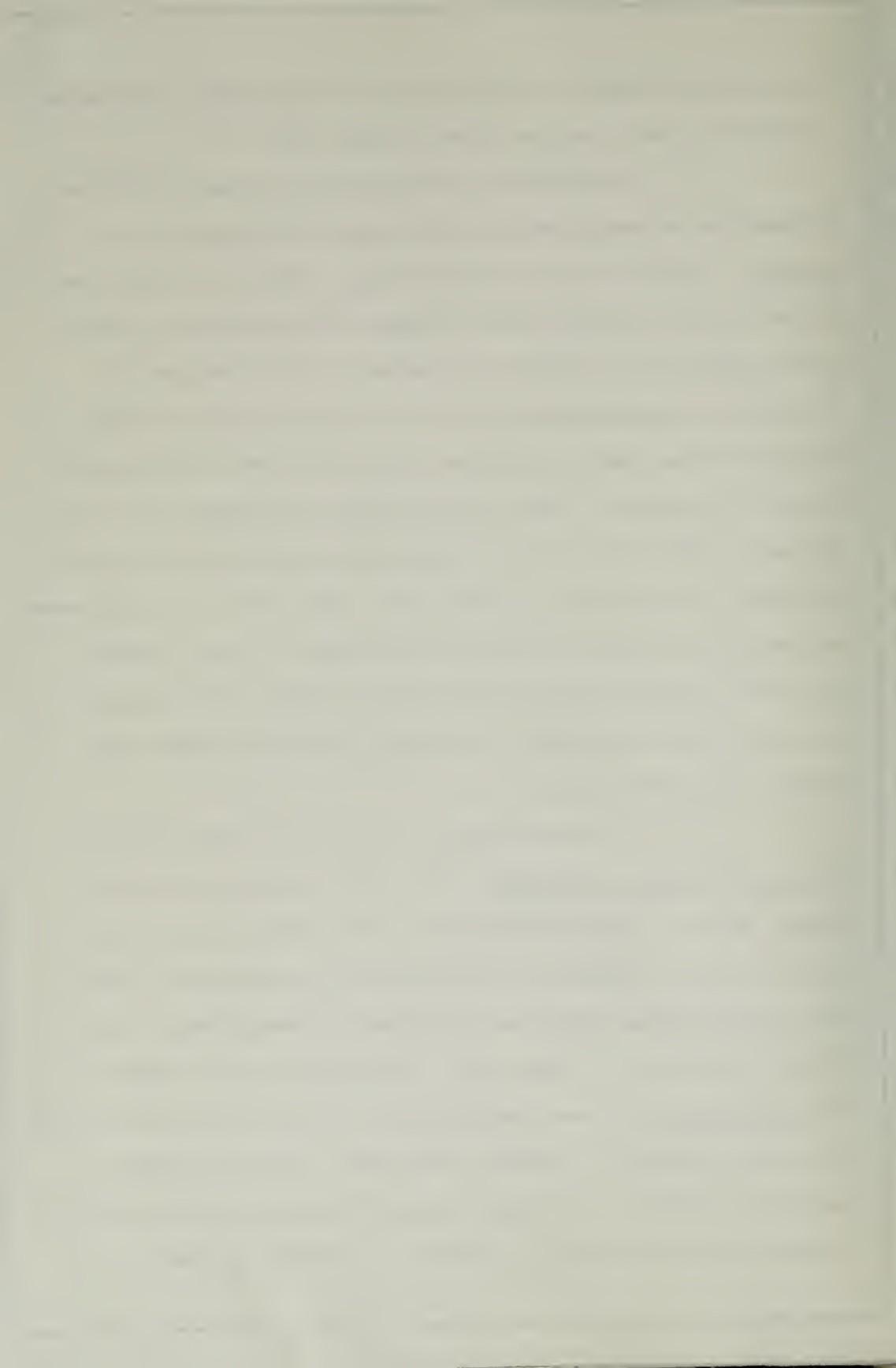
1 the Second District, (Diodes, Inc. v. Franzen (1968)
2 260 ACA 241) held that in order to plead adequately a
3 cause of action for protection against the use or dis-
4 closure of a trade secret, one must plead facts showing
5 (1) the existence of subject matter which is capable of
6 protection as a trade secret; (2) that the secret was
7 disclosed to the defendant under circumstances giving
8 rise to a contractual or other legally imposed obligation
9 on the part of the disclosee not to use or disclose the
10 secret to the detriment of the discloser; and (3) if the
11 defendant is an employee or former employee of the
12 plaintiff the facts alleged must also show that the
13 public policy in favor of the protection of the complainant's
14 interest in maintaining the secret outweighs the interest
15 of the employee in using his knowledge to support himself
16 in other employment. (Page 247) Presumably, these
17 same elements would have to be proven in order to establish
18 a prima facie case for the protection of trade secrets.
19 The appellate court affirmed the trial court's dismissal
20 of the action essentially upon the basis that plaintiff
21 failed "to plead facts showing that it ever had any
22 trade secret to protect", and that the complainant should
23 "describe the subject matter of the trade secret with
24 sufficient particularity to separate it from matters of
25 general knowledge in the trade or of special knowledge
26 of those persons who are skilled in the trade, and to



1 permit the defendant to ascertain at least the boundaries
2 within which the secret lies." (Page 250)

3 Appellant faces the same dilemma Justice
4 Hufstedler encountered in evaluating the complaint in
5 Diodes. After four days of hearings before the District
6 Court, after studying the 63 pages of Respondent's Brief,
7 after comparing the Snelling manual to the others in-
8 troduced in evidence herein, he is yet unaware of any
9 aspect of the Snelling system which is novel, of unique
10 value, or secret. That its training is helpful, is not
11 denied. That its manuals are useful, as are the others
12 reviewed, is conceded. But he has been led to no process,
13 no method, surely no device or machine, nor any unique
14 or novel business idea or concept in which Snelling has
15 or could have acquired a property interest under the
16 trade secret doctrine.

17 In this respect, Snelling's reliance on
18 Ernst and Ernst v. Carlsen (1966) 247 Cal App 2nd 125
19 (Resp. Br. 49) seems misplaced. There the proceedings
20 were to enjoin Carlsen "from unfairly interfering with
21 the advantageous business relations of Respondents and
22 their customers." (Page 127) This involved no aspect
23 of competition between respondents, a nationwide accounting
24 firm, and Carlsen, a former employee. Rather, Carlsen
25 sought to disrupt the advantageous business relationship
26 between the accounting firm and one of its clients,



1 contending the firm had improperly given capital gains
2 treatment to certain transactions rather than ordinary
3 income. The injunction merely silenced the employee and
4 prevented a continuation of his efforts to cause a breach
5 between the accounting firm and the client. While
6 Carlsen continued to work in the area, and solicited this
7 particular client, among others whose files he had handled
8 while working for his former employer, this aspect of
9 his conduct was not involved in the case on appeal. The
10 extensive quotation from the decision, (Resp. Br. 50)
11 appears to be simply another manifestation of Snelling's
12 predilection toward citation of case authority where
13 no factual similarity exists.

14 CONCLUSION

15 The facts in this case show the value
16 of the doctrine of stare decisis. McDonough's counsel's
17 letters to Snelling show his reliance upon the state of
18 the law as it existed under Davis v. Jointless Fire Brick
19 Co. (1924) 300 F. 1 and Sections 16600-16602 of California's
20 Business and professions Code.

21 The very purpose of the doctrine is to
22 enable business and professional men to plan and govern
23 their affairs under a discernible rule of law.

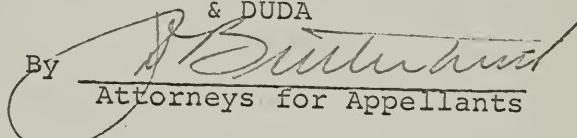
24 The dangers of tampering with the doctrine
25 have been most expressively demonstrated in the calamitous
26 events which have befallen Appellant to this point in

1 the case.

2 This Court's reversal of the order of the
3 District Court would restore a measure of permanence and
4 order to an admittedly complex socio-economic problem.

5 Respectfully submitted,

6
7 HENNIGAN, BUTTERWICK, HANING
8 & DUDA

9 By 

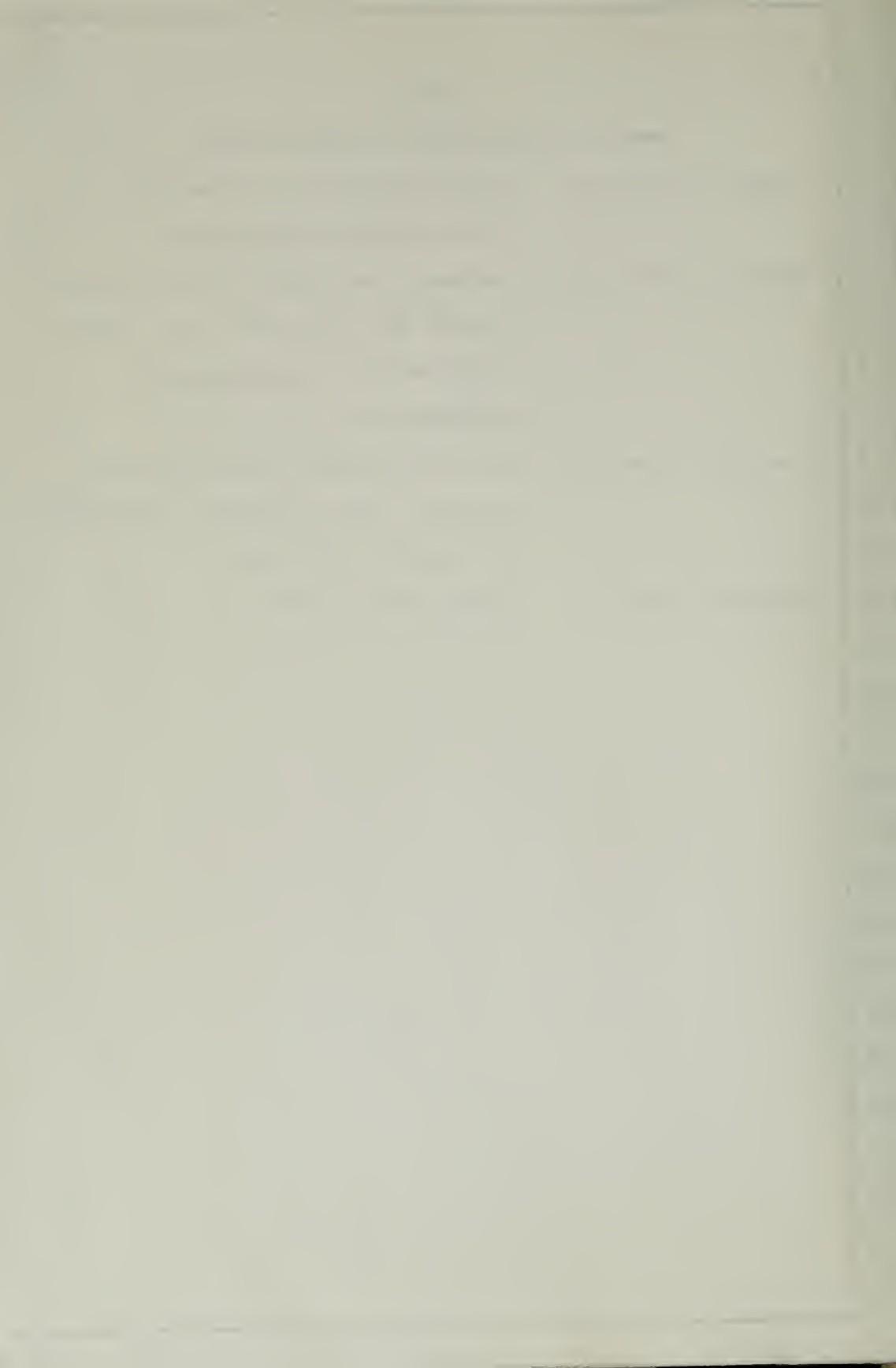
10 Attorneys for Appellants



1 INDEX

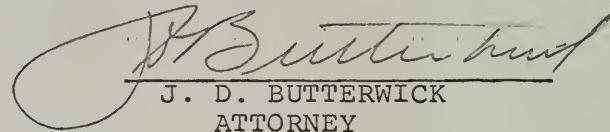
2 ERRATA IN APPELLANTS OPENING BRIEF

- 3 Page 8, Line 26: Change Reporters' Transcript
4 Reference to: "(255-256)"
- 5 Page 15, Line 20: Between the words "to" and "the"
6 insert the following: "in. They
7 would be more appropriately
8 addressed to"
- 9 Page 50, Line 16: At end of line, insert the fol-
10 lowing: "(R 115/20-25; 116/10-16;
11 117/19-25; 120/2-15)"
- 12 Page 62, Line 15: Change "4" to "Y"
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26



1 CERTIFICATE

2 I certify that, in connection with the
3 preparation of this brief, I have examined Rules 18,
4 19, and 39 of the United States Court of Appeals for
5 the Ninth Circuit, and that, in my opinion, the fore-
6 going brief is in full compliance with those rules.

7 
8 J. D. BUTTERWICK
9 ATTORNEY

10 CERTIFICATE OF SERVICE BY MAIL

11 I, J. D. BUTTERWICK, certify that I am the
12 attorney for appellants in this action, and that I
13 served three copies of the above Appellants' Reply
14 Brief by mail on the attorney for appellee.
15

16 DATED: August 1, 1968.

17 
18 J. D. BUTTERWICK
19
20
21
22
23
24
25
26

